91-1880

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF OHIO, DEPARTMENT OF LIQUOR CONTROL,
Petitioner,

v.

BROOKPARK ENTERTAINMENT, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A LOCAL LIQUOR OPTION ELECTION, DIRECTED AT A SPECIFIC PREMISES, IS CONSTITUTIONAL, WHERE, AS A CONDITION PRECEDENT TO SUCH ELECTION, THE BUSINESS, AFTER NOTICE AND HEARING, HAS BEEN FOUND BY THE STATE LIQUOR CONTROL COMMISSION TO HAVE VIOLATED THE STATE'S LIQUOR CONTROL LAW.

LIST OF PARTIES

The parties to the proceedings below were Petitioner Ohio Department of Liquor Control, Bob Taft, substitute party for Sherrod Brown, Secretary of State for Ohio, Cuyahoga County, Ohio Board of Elections members John Coyne, Robert Hughes, Thaddeus J. Jackson and Roger M. Synenburg all named in their official capacities and Dale Miller, City Councilman for the City of Brookpark, named in his official capacity. Ohio Secretary of State Bob Taft, although originally a party to this proceeding, has declined participation in this proceeding, and therefore is not a party herein. While service of this petition is made upon him, a notice pursuant to Rule 12.4 of this Court will subsequently be filed.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit issued February 20, 1992 (A-1) is reported at 951 F.2d 710 (6th Cir. 1992) under the name *Brookpark Entertainment, Inc. v. Bob Taft, et al.*. The opinion of the United States District Court for the Southern District of Ohio, Eastern Division issued November 6, 1990 (A-15) from which the appeal arose is reported at 750 F. Supp. 856 (S. D. Ohio 1991) under the name *Brookpark Entertainment, Inc. v. Brown, et al.* The opinion of the same District Court on the injunction pending appeal, issued June 4, 1991 (A-27) is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was issued on February 20, 1992. The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved in this case are Ohio Rev. Code §§ 4301.321, 4301.331, 4301.352 and 4301.362. Additionally for this Court's consideration are Amendments XIV, XXI, U.S. Constitution. All of the above are reproduced in the attached appendix.

STATEMENT OF THE CASE

This petition arises from the decision of the United States Court of Appeals for the Sixth Circuit holding a local liquor option election against the operation of the liquor license of Respondent herein, Brookpark Entertainment, Inc. (hereinafter, "Brookpark"), to be unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment.

Statutory Mechanism

Pursuant to Ohio Revised Code (hereinafter, "O.R.C.") §4301.321 the electors of an election precinct may hold a local liquor option election with respect to the operation of a liquor license at particular premises within the precinct, if, within one year prior to the election, the permit holder has been found by the liquor control commission to have violated the state liquor control laws. Subject to certain time requirements for filing, the local option election is initiated by petition signed by enough voters to equal 35% of the total number of votes cast in the precinct in the last general election for governor. O.R.C. §4301.331. Procedures exist for a protest and determination with respect to the validity of the petitions. If a petition is deemed valid, a special election is scheduled to coincide with the next primary or general election. O.R.C. §4301.352. If a majority of the electors, voting on the question, choose against the continued operation of the liquor license at the premises which is the subject of the election, the board of elections notifies the Department of Liquor Control, which then takes and cancels the permit holder's license. O.R.C. §4301.362.

Facts

Brookpark owns and operates a nightclub called the "Crazy Horse Saloon" in Cleveland, Ohio. Brookpark was able to sell alcohol through the establishment pursuant to several Class D nightclub permits issued to it by the Department of Liquor Control. In October, 1989, Brookpark was cited by the Department of Liquor Control for selling beer at the location while its permit was under a prior suspension. After notice and a hearing, the Ohio Liquor Control Commission found Brookpark to be in violation for the sale of alcoholic beverages at the permit premises during the effective period of suspension. The Commission ordered, however, that no penalty be imposed and Brookpark took no appeal from that decision.

Thereafter, Cleveland city councilman Dale Miller, a defendant in the federal proceedings, and another individual, Joyce Harris, who was not named as a defendant, circulated petitions and filed the appropriate number of signatures to place the referendum on the ballot. Although aware of the filing, Brookpark made a conscious decision not to cause a protest of the petitions to be filed. Instead, this litigation commenced.

Proceedings

On October 23, 1990, Brookpark filed an action, pursuant to 42 U.S.C. §1983, in the United States District Court for the Southern District of Ohio, seeking to restrain the local liquor option election. After interim proceedings, the district court dismissed the complaint. The district court opined that the filing for the election was untimely under state law and believed "relevant state code sections will provide resolution to this matter." (A-23). Accordingly, the court dismissed the case as moot and for lack of jurisdiction. (A-26). However, the court went on to state its belief that no constitutional violations were present, if those issues were before the court. Both Brookpark and the State appealed, although the State appealed only on the issue of the court's interpretation of the timeliness question regarding the election.

Because no injunction was issued, the election went forward as scheduled, with a majority of voters electing against Brookpark's operation. Brookpark then filed an action in prohibition and mandamus in the Ohio Supreme Court to prevent certification of the election results and cancellation of its license. In *State ex Rel. Brookpark v. Board of Elections* (1991) 60 Ohio St. 3d 44, 573 N.E. 2d 596, the Ohio Supreme Court denied the writs. The Court specifically disagreed with the district court and found the election to have been timely under Ohio law.

On June 4, 1991, a hearing was held before the district court on a motion to stay the certification and cancellation pending appeal. The district judge denied the stay, reaffirmed his belief that no constitutional violation was shown and in effect incorporated his prior holding as to the consitutional issues as his holding in the case. (A-27).

Upon appeal, the Sixth Circuit reversed. (A-1). The Court rejected the district court's analysis of Ohio law that no property right exists in a liquor license and otherwise held that the single premises local option election conducted under Ohio law violated the Due Process Clause of the Fourteenth Amendment to the Constitution. The panel rejected Equal Protection and Bill of Attainder claims as alternative bases for relief. The panel then remanded the case to the district court to issue appropriate relief. A timely petition for rehearing was denied on February 20, 1992. (A-38).

REASONS FOR GRANTING THE WRIT

The petition presents important and novel questions, never previously addressed by this Court, as to the limits to which a state may use a local liquor option election to regulate the sale of alcoholic beverages. Unquestionably, the states have great latitude and authority under the Twenty-First Amendment, to regulate and control traffic in intoxicating liquor within their borders. U.S. Const. Amendment §XXI. *Phillips v. Mobile*, 208 U.S. 472, 28 S. Ct. 370, 52 L. Ed. 578 (1908); *California v. LaRue*, 409 U.S. 109, 93 S. Ct. 390, 34 L. ed. 2d 342 (1972).

Yet, the decision of the Court below destroys an integrated and comprehensive enforcement mechanism, in which the persons most affected by the sale of liquor, may use the most basic tool of democracy—the vote—to control their own lives. *State ex Rel Mansfield v. Board of Elections*, (1988) 40 Ohio St. 3d 16, 530 N.E. 2d 1327. The petition will demonstrate that the Ohio statutory scheme in effect to regulate Brookpark's license does not violate due process of law.[1] In the process, the petition will argue that the court below has ignored authoritative constructions of Ohio law by the Ohio Supreme Court, and has sown the seeds by which all local liquor option laws may be challenged.[2]

I. As one of several bases upholding the constitutionality of the election, the district court relied on authoritative

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[1] Effective April 11, 1991, O.R.C. §4301.331 was amended. (A-43). For purposes of this case, the only substantive change is the requirement in the condition precedent to an election that the Liquor Control Commission must find a violation *and assess a penalty*. Additionally, the affected permitholder receives direct, rather than general notice of the election to be held, and may directly protest the election. Ostensibly, the Sixth Circuit did not rule on the validity of the new statute. However, there is nothing in the Sixth Circuit's opinion which would allow for distinction in result. Accordingly, the Sixth Circuit's decision is the death knell of the amended statute as well.

[2] At least 28 other states have some form of local option election laws affecting sale of intoxicating liquor.

constructions of the Ohio courts that a liquor license is not a "property right." While the state's position is not dependent upon prevailing on this point alone, the Court of Appeals was incorrect in ignoring these authoritative constructions.

In *State ex Rel Zugravu v. O'Brien,* (1935) 130 Ohio St. 23, 196 N.E. 664, the court held, "[p]ermits to carry on the liquor business . . . are mere licenses, revocable as therein provided, and create no contract or property right." *Ibid.,* at syllabus. Similarly, in *Abraham v. Fioramonte,* (1952) 158 Ohio St. 213, 107 N.E. 2d 321, the court stated, "[p]ermits issued by the Department of Liquor Control . . . are personal licenses and are not property which can be mortgaged or seized under execution . . ," 158 Ohio St., at 213, 107 N.E. 2d, at 322 (syllabus). In *Salem v. Liquor Control Commission,* (1973) 34 Ohio St. 2d 244, 298 N.E. 2d 138, the court stated:

> Realizing that the liquor industry requires such regulation, the states have not granted irrevocable permits in the nature of vested property rights to retail liquor businesses, but instead have issued "licenses."
>
> 34 Ohio St. 2d, at 245, 298 N.E. 2d, at 140.

More recently, in *Rickard v. Department of Liquor Control,* (1986) 29 Ohio App. 3d 133, 504 N.E. 2d 724, and in *Scioto Trails Co. v. Department of Liquor Control,* (1983) 11 Ohio App. 3d 75, 462 N.E. 2d 1386, the court upheld challenges to precinct-wide local liquor option elections in part on the basis that a liquor license is not property.[3] The Ohio Supreme Court refused to further review these decisions.

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[3] A precinct-wide local option election determines whether the entire precinct will be "wet" or "dry". Unlike a local option election directed against a specific premises, the election does not cancel the license. The license under such an election may be kept in safekeeping in the event the Department of Liquor Control will allow transfer to another location.

The Sixth Circuit Court of Appeals rejected these cases, citing the familiar rule that the label a state attaches to an interest does not determine whether a property right exists for due property purposes:

> Although the underlying substantive interest is created by "an independent source such as state law" federal constitutional law determines whether that interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause.
>
> 951 F. 2d 710, 714 (A-7), citing *Memphis, Light, Gas & Water v. Craft*, 436 U.S. 1,9, 98 S.Ct. 1554, 1560, 56 L. Ed. 2d 30 (1978).

However, the court went beyond that rule by affirmatively misstating the requirements under Ohio law. The court below cited to its prior decision in *In re Terwilliger's Catering Plus, Inc.* 911 F. 2d 1168 (6th Cir. 1990), in which the court had declared an Ohio liquor license to have certain indicia of property. But *Terwilliger's* did not hold that a liquor license was property in the constitutional sense. Rather, the court found a very limited property interest within the meaning of the Bankruptcy Code such that a tax lien could be imposed on the sale of such license.

Moreover, contrary to statements in *Terwilliger's* to that effect, a liquor license may not be transferred, sold or inherited. O.R.C. §4301.26 provides, in pertinent part, that the Liquor Control Commission shall cancel permits "in the event of death or bankruptcy of the holder, the making of an assignment for the benefit of creditors of the holder, or the appointment of a receiver of property of the holder, except as otherwise provided in the rules of the Department of Liquor Control relative to the transfer of permits."

Transfers may be allowed, but such is at the discretion and with the consent of the Commission and not as of right in the holder of a license. O.R.C. §4303.273. Similarly, a

license may be renewed, but only upon the decision of the Department. By their terms, licenses expire after one year.

To be sure, the Ohio statutory scheme provides notice and hearing for many of the decisions that need to be made, including, revocation, suspension, renewal, and transfers. But the Sixth Circuit incorrectly assumes from these provisions, that the legislature intended to create a property right. Just as the label a state places on an interest does not determine the interest for constitutional purposes, neither does the process given to the holder of the privilege.

II. Even if Ohio law creates a property interest in a liquor license, it still must be determined what interest is created by such license. In *Scioto Trails, supra,* the court indicated the nature of any property interest that might exist:

> . . . . the holder of a liquor permit holds the permit subject to the exercise of right of local option . . . with the contingency of termination . . .
>
> 11 Ohio App. 3d 75, 77, 462 N.E. 2d 1386, 1388.

The court concluded:

> In Ohio, every liquor permit owner takes his permit subject to the right of the residents of the territory within which the establishment is located to terminate any right to sell liquor within that territory and at the permit premises through the exercise of local option election results.
>
> *Id.*, at 79, 462, N.E. 2d, at 1390.

See also *Rickard, supra.*

A property interest consists of a certain set of rights. In this case, the legislative authority which created the set of rights, reserved certain rights to the people. This is not a case in which the state argues that property is defined by the procedures provided for its deprivation. This Court has

affirmed on more than one occasion that the right to due process is conferred by the nature of the interest, not the process provided. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 541, 105 S.Ct. 1487, 1493, 84 L.Ed. 2d 494 (1985). However, the starting point is still what interest exists. In this case, the legislature could have provided for a complete prohibition on the sale of liquor. If an interest is conferred at all, it is expressly made subject by statute to the ability of the people to enact a prohibition upon local referendum. *See, Philly's v. Byrne,* 732 F. 2d 87 (7th Cir. 1984), at 94, Judge Wood concurring. Here, it is not the procedure which reserves the right, but the right of the people to referendum that defines the process for exercising the right that was reserved.

III. Even if a property right exists for which due process is required, the Ohio statutory scheme provides full due process by the requirement of a condition precedent that the permitholder be found to have violated Ohio's liquor laws. Every business granted a permit is put on notice by the statute itself that a violation which is found, after notice and hearing, may trigger a local liquor option election. Thus when charged with having violated a prior suspension, Brookpark had full notice that a local option election could result, if it were found in violation. Brookpark had notice of the hearing, participated in the hearing, was found in violation pursuant to the hearing, and failed to appeal that decision. It is hard to imagine what further procedural due process is due. The local option election only occurs after full notice, hearing and finding on a specific charge, and after statutory notice that such an election may result.

The court below relied on *87 South Rothschild Liquor Mart v. Kozubowski,* 752 F. Supp. 839 (N.D. Ill., 1990) as precedent. However, in that case there was no requirement of a prior finding as a condition precedent to a specific premises liquor option election.

IV. Even if the procedures provided with respect to the condition precedent are not sufficient, the process provided

by the local option election itself is sufficient to satisfy due process.

In *Rippey v. Texas*, 193 U.S. 504, 24 S. Ct. 516, 48 L Ed. 767 (1904), this Court upheld the general validity of local liquor option elections. In essence, Justice Holmes set forth that a local option election was within the legislative authority of a state to enact a prohibition on the sale of liquor, effective only upon a local referendum. *See also, Gordon v. State*, (1889) 46 Ohio St. 607, 27 N.E. 63. That premise is significant.

When a legislative enactment is questioned on due process grounds, a different examination of what process is due is involved than in an adjudicatory proceeding. Generally, legislative actions which are of general applicability are not subject to a due process requirement of notice and a hearing. *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*, 239 U.S. 441, 445, 36 S. Ct. 141, 142, 60 L. Ed. 772, (1915); *Rickard, supra.*

If the statute takes away certain rights, the question is not whether the person had notice that the legislature was about to act, or whether a hearing was held, but rather whether the statute itself is within the power of the legislature to enact. As held in *Rickard:*

> A local option election involves a legislative action, not an administrative or quasi-judicial action. Although such an election may affect the right of plaintiffs to use their liquor permits in the precinct in which the election is being held, no right of plaintiffs are being adjudicated. Rather, the issue on a local-option election is whether legislation shall be adopted making the sale of intoxicating liquor unlawful in the area in which the local-option election is held.
>
> 29 Ohio App 3d, at 139, 504 N.E. 2d, at 730.

In essence, the real question presented is not procedural due process, but the substantive power of the state to

legislate. The fundamental flaw of the court below is that it gave no deference to the State's power under the 21st Amendment to enact a specific premises local option election.

The court below distinguished *Philly's, supra,* which had allowed a general wet/dry liquor option election. The court below believed that, unlike a general election, a specific premises election had an element of arbitrariness to it, because voters could gang up on only those establishments that they disliked. However, the condition precedent of an adjudicated violation that exists under Ohio law belies that claim. While the Ohio Liquor Control Commission may not initiate a local option referendum, neither can local citizens create the adjudicated violation which serves as the starting point for a referendum under O.R.C. §4301.331. That requirement clearly distinguishes the Ohio statute from the Illinois statute found offensive in *87 South Rothschild, supra.*

The procedures of protest of the petition, and after an election, of an election contest also protect against arbitrary action. *Walt's Friendly Tavern v. Dept. of Liquor Control,* (1983) 11 Ohio App. 3d 277, 464 N.E. 2d 610. Moreover, the provision that petitions equalling 35% of the voters in a prior general election be submitted serves as a check against arbitrary enforcement. Finally, the business which may be subject to the election may campaign prior to the actual election, which requires a majority vote to rescind the license.

The Ohio Statute is not arbitrary, and is rationally related to legitimate police and regulatory power under the Twenty-First Amendment. The court below erred in substituting its judgment for that of the Ohio legislature and in this case, the vote of the electorate.

The frightening aspect of the decision of the court below is that by defining the question as the process due to prevent arbitrariness, the court invites the prospect that other local option elections may be rejected. The court below sought to distinguish the local option elections in *Scioto Trails* and *Rickard,* since under a general wet/dry referendum, the

license is not canceled, but held in abeyance. However, for constitutional purposes, the Court failed to adequately distinguish between taking away the ability to use a license at all and the ability to do business at the particular location for which the license was originally granted.

In its decision, the court failed to note that, if a liquor license results in a property interest or right, then certainly the right to transact business at the location for which it was granted would be protected as well. Voting the precinct entirely dry could, by itself, cause economic hardship, even if the license could ultimately be transferred to another location. The panel appeared to approve a general election, as occurred in *Scioto Trails* and *Rickard, supra.* Yet the panel ignored that in some precincts, where there is only one permit holder in the precinct, such as occurred in the *Scioto Trails* case, a general election as to the local option question may have the same practical effect as the specific premises election invalidated by the Sixth Circuit. Voting a precinct dry might cause severe financial loss, even if the license could ultimately be transferred. The panel distinguished the holding in *Scioto Trails* even though the safeguard of a prior showing of a detriment to the community was not evidenced, while, in this case striking down statutory provisions which had this protection against arbitrariness. To that extent, the holding in this case may have consequences beyond the one statute.

As its final conclusion, the court below argued that the statute in question lacks proportionality, in that a local option election may be held for a business which has a relatively minor violation, but not for a more major violation. While that could happen, the risk seems to be one inherent in any public referendum. An electorate could decide to recall one officeholder instead of another without any regard to the conduct of one officeholder being better or worse than that of the other. Moreover, the court's conclusion is inconsistent with it's apparent approval of the decision in *Philly's, supra.* The result of that decision is that a general wet/dry referendum may negatively impact on a wholly innocent permitholder even though the purpose of the local

option vote is to target one establishment. The panel's proportionality argument is merely its judgment as to the wisdom of the act.

This case involves the power of the legislature to regulate the sale of liquor and the right of the State's citizens to exercise the vote which has been delegated to them. This Court should grant certiorari to uphold the statute at issue consistent with the powers reserved to the states under the Twenty-First Amendment.

Respectfully submitted,

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RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 90-4130/91-3070

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BROOKPARK ENTERTAINMENT, INC., d/b/a/ Crazy Horse Saloon,

Plaintiff-Appellant,
Cross-Appellee,

v.

BOB TAFT; JOHN HALL,

ON APPEAL from the United States District Court for the Southern District of Ohio

Defendants-Appellees,
Cross-Appellants,

ROBERT HUGHES; JOHN M. COYNE; THADDEUS J. JACKSON; ROGER M. SYNENBERG; DALE MILLER,

Defendants-Appellees.

Decided and Filed December 16, 1991

Before: GUY, Circuit Judge; BROWN, Senior Circuit Judge; and CHURCHILL, Senior District Judge.*

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*Honorable James P. Churchill, United States District Court for the Eastern District of Michigan, siting by designation.

RALPH B. GUY, JR., Circuit Judge. The plaintiff, a nightclub, challenges the constitutionality of an Ohio statute allowing for the revocation of its liquor license by popular referendum. The district court dismissed the action, finding that the federal issues were moot because the referendum on the plaintiff's license was untimely under Ohio law. The district court also stated in dicta that the plaintiff's constitutional challenges were meritless. The Ohio Supreme Court subsequently ruled that the challenged referendum was timely under Ohio law.

We find that the district court based its dismissal on an erroneous reading of Ohio law, and we reverse that dismissal. Since the district court has twice spoken to the merits of plaintiff's constitutional claims and since those claims challenge the Ohio statute on its face, we find those claims properly before us. We hold that the challenged Ohio statute is facially unconstitutional under the Due Process Clause of the Fourteenth Amendment. Therefore, we remand the case to the district court with instructions to enter a judgment for the plaintiff.

I.

The facts are essentially undisputed. The plaintiff, Brookpark Entertainment, Inc., operates the Crazy Horse Saloon in Cleveland. Brookpark sells alcoholic beverages under a series of permits issued by the Ohio Department of Liquor Control.

The Department suspended Brookpark's liquor permits during the summer of 1989. On November 16, 1989, the Department found that Brookpark had violated Ohio liquor control laws by selling liquor during the suspension. Brookpark contended that the violation resulted from a misunderstanding as to whether the suspension had been stayed. The Department imposed no penalty for the violation.

The Department's decision not to penalize Brookpark for the violation did not end Brookpark's problems. Under Ohio law, the voters living in the same precinct as a liquor establishment can revoke the establishment's license by

referendum within one year of a finding of any liquor law violation. Ohio Rev. Code §§4301.321, 4301.331, 4301.352, 4301.362. The local election board must place the question on the ballot if it receives valid signatures equal to 35 percent of the votes cast in the precinct in the most recent gubernatorial election. Ohio Rev. Code §4301.33. During the summer of 1990, Dale Miller, a Cleveland city councilmember, and several other citizens began circulating petitions to put Brookpark's liquor license on the ballot. On August 24, 1990, the Cuyahoga County Board of Elections notified Brookpark that it had received the petitions. Brookpark did not challenge the validity or sufficiency of the petitions or signatures. The Board of Elections validated the petitions and certified this question for the November 6, 1990 ballot: "Shall the sale of spirituous liquor, mixed beverages, wine and beer by Brookpark Entertainment, Inc., dba Crazy Horse Saloon at 16600 Brookpark Rd., Cleveland, Ohio 44135 be permitted in this precinct?"

Brookpark filed this action on October 23, 1990, alleging that the Ohio "particular premises" local option law is facially unconstitutional. In particular, Brookpark claimed that the law violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Article I, Section 10 prohibition against bills of attainder. Brookpark's complaint named as defendants Councilmember Miller, four members of the Cuyahoga County Board of Elections, the director of the Department, and the Ohio Secretary of State. Brookpark sought declaratory and injunctive relief. Brookpark also requested both a preliminary injunction and a temporary restraining order to prevent the members of the election board from counting the ballots, certifying the results, or notifying the Department of the outcome of the upcoming referendum.

On the day of the election, the district court *sua sponte* dismissed the entire cause of action for lack of federal subject matter jurisdiction. *Brookpark Entertainment, Inc. v. Brown*, 750 F. Supp. 856 (S.D. Ohio 1990).[1] The court noted that

[1] On appeal, the new Secretary of State, Bob Taft, has been substituted as a defendant for the previous Secretary, Sherrod Brown.

section 4301.321 requires any "particular premises" election to be held within one year of the time the establishment "has been found . . . to have violated" a liquor law. The court interpreted this section to require that the election be held within one year of the date of the violation, not the date of the finding. *Id.*, 750 F. Supp. at 860. Since the violation occurred more than a year before the election, the district court held that the election was clearly untimely under Ohio law. *Id.* Therefore, the court held that federal subject matter jurisdiction was lacking because the case was moot. *Id.*

The district court's opinion went on, however, to discuss Brookpark's constitutional claims in dicta. The court concluded that the statute was not a bill of attainder since it did not single out anyone for legislative punishment. *Id.*, 750 F. Supp. at 862. The court also stated that Ohio's interest in regulating the sale of liquor met the rational relationship test under the Equal Protection Clause. *Id.* Finally, the court stated that an Ohio liquor license is not property within the meaning of the Due Process Clause and that the Ohio statute contains ample procedural protection. *Id.* at 860-61.

Brookpark then filed this appeal of the district court's dismissal. The Secretary of State and the director of the Department cross-appealed to challenge the district court's interpretation of the election timing requirements.

After the district court dismissed the case, Brookpark petitioned the Ohio Supreme Court for writs of prohibition and mandamus to stop the certification of the election results. Brookpark based its petition on the same state law grounds that the district court relied upon to dismiss Brookpark's claims. On May 29, 1991, the Ohio Supreme Court denied Brookpark's petition. *State ex rel. Brookpark Entertainment, Inc. v. Cuyhahoga County Bd. of Elections,* 60 Ohio St. 3d 44, 573 N.E.2d 596 (1991). The state court expressly rejected the district court's interpretation of the election timing requirements and held that the one-year period did not begin to run until the Department formally found the violation on November 16, 1989. *Id.*, 573 N.E.2d at 600-01.

Six days later, the district court denied Brookpark's motion for an injunction pending this appeal. Finding that the issue of the statute's constitutionality was now squarely before it, the court adopted its earlier dicta to conclude that Brookpark was not likely to succeed on the merits.[2]

II.

Both Brookpark and the cross-appellants argue that the district court's sua sponte dismissal for lack of subject matter jurisdiction was error. We agree and reverse that dismissal.

The district court erred by labeling the reasoning for its dismissal as jurisdictional. Essentially, the district court dismissed Brookpark's constitutional claims because it held that Brookpark had a clear winning claim under Ohio law. Such a holding is irrelevant to jurisdiction. The only jurisdictional question properly before the district court was whether federal question jurisdiction was invoked on the face of Brookpark's complaint. We agree with the parties that Brookpark's complaint invoked federal question jurisdiction.

As a result of the district court's ruling, Brookpark was forced to file a petition in state court in a futile attempt to obtain relief on a supposedly favorable state law ground that it had never urged before the district court. At the same time, the state was saddled with an unfavorable interpretation of its election timing requirements and has cross-appealed in an attempt to overturn that ruling. The error was compounded when the district court's interpretation of Ohio law turned out to be wrong. The Ohio Surpeme Court held

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[2] The only order before us on appeal is the November 6, 1990, dismissal of Brookpark's case. However, our recitation of the facts demonstrates that many significant developments occurred after this appeal was initiated. In fact, the Ohio Supreme Court's decision came *after* Brookpark's reply brief was filed (but before the cross-appellant's reply briefs were filed). While we only review the November 6, 1990, dismissal, we note the subsequent history because it would be anomolous for us to ignore it given our ultimate disposition of this appeal.

that the time for an election runs from the date of the finding, not the date of the violation. *Brookpark*, 573 N.E.2d at 600-01. We hold that the district court erred in dismissing Brookpark's complaint on jurisdictional grounds. Accordingly, we reverse that dismissal.[3]

III.

The district court has twice spoken on the merits of Brookpark's constitutional claims. After dismissing Brookpark's claims for lack of subject matter jurisdiction, the court stated at length that those claims were legally insufficient. *Brookpark*, 750 F. Supp. at 860-62. When Brookpark sought an injunction pending this appeal, the court again ruled that Brookpark's constitutional claims lacked merit.

Since Brookpark attacks the constitutional validity of the statute on its face, there are no real issues of material fact to be resolved. Under these circumstances, we agree with the cross-appellants that it would be a waste of judicial resources to remand for a hearing on the merits of Brookpark's constitutional claims. Therefore, we consider those claims.

Brookpark first argues that the Ohio "particular premises" local option statute violates the Due Process Clause of the Fourteenth Amendment. We agree.

The district court stated, and the defendants argue on appeal, that an Ohio liquor license is not property within the meaning of the Due Process Clause. "The due process clause only protects those interests to which one has a 'legitimate claim of entitlement.' This has been defined to include 'any significant property interests, including statutory

[3] The cross-appellants argue that the district court should have abstained from ruling on Ohio law. We need not consider this argument because the Ohio Supreme court has definitively rejected the district court's interpretation of state law.

entitlements.' " *Brotherton v. Cleveland,* 923 F.2d 477, 480 (6th Cir. 1991). "Government licenses are . . . a form of property insofar as they constitute an entitlement to engage in a valuable activity." 2 Ronald D. Rotunda et al., Treatise on Constitutional Law: Substance and Procedure § 17.5 (1986). An individual having "present enjoyment of the benefit and a claim of entitlement to its continuation under state law . . . [has] a property interest which [is] protected by the due process clause." *Id.*

To decide whether a liquor license is property under the Due Process Clause, we must examine both Ohio law and federal constitutional law. "Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process clause." *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 9 (1978) (citations omitted). The license may rise to the level of property under the Due Process Clause even though Ohio chooses not to call it property. "[W]e must look behind labels, and decide whether the plaintiffs' license was 'property' in a functional sense." *Reed v. Village of Shorewood,* 704 F.2d 943, 948 (7th Cir. 1983)(citations omitted). In short, we look to Ohio law to determine the nature of the interest, not the *label* to apply to it.

We therefore begin our inquiry by examining the interests that attach to an Ohio liquor license. We recently examined Ohio liquor licenses to determine whether they are property for the purposes of federal tax and bankruptcy law. *In re Terwilliger's Catering Plus, Inc.,* 911 F.2d 1168 (6th Cir. 1990). In concluding that Ohio liquor licenses are property, we stated:

> Ohio allows a liquor license to be transferred, sold, inherited, and renewed. *See generally,* Ohio Rev. Code Ann. §§4303.26, 4303.271, and 4303.273 (Anderson 1988) and Ohio Admin. Code §4301:1-1-14. It is undeniable that a liquor license has pecuniary value to its holder since the license

> enables the holder to sell alcoholic beverages and can be sold for value. Since the state has vested the owner of a liquor license with these beneficial interests, a liquor license constitutes "property" or "rights to property" within the meaning of federal tax lien law.

Id., 911 F.2d at 1171 (footnote omitted).

In addition to the rights to transfer, sell, bequeath, and renew, a holder of an Ohio liquor license also has the right to a hearing before revocation and the right to appeal any adverse determination of the Department. Ohio Rev. Code §§ 4301.27, 4301.28. In *Reed*, the Seventh Circuit held that an Illinois liquor license was property within the meaning of the Due Process Clause even through it could not be sold or bequeathed. *Id.*, 704 F.2d at 948. The court found that the Illinois license was property because the holder had a right of renewal and the license could be securely held for its term unless there was cause for revocation. *Id.* While the Ohio revocation provision does not state that a license can only be revoked for cause, the notice, hearing, and appeal provisions would be pointless unless the legislature intended there to be some reason for revocation. Since an Ohio license can be sold and bequeathed, it has even more of the attributes of property than the Illinois license at issue in *Reed*.

The defendants rely on a series of Ohio cases to support their contention that a liquor license is not property. In *State ex rel. Zugravu v. O'Brien*, 130 Ohio St. 23, 196 N.E. 664 (1935), the Ohio Supreme Court concluded that a liquor licensee had no property interest because the legislature could terminate the license. *Id.* 196 N.E. at 666. In *Abraham v. Fioramonte*, 158 Ohio St. 213, 107 N.E.2d 321 (1952), the court relied on the fact that a license at that time could not be sold to conclude that it was not property. *Id.* 107 N.E.2d at 327-28. The Ohio Court of Appeals has also held that a liquor license is not a property interest. *Scioto Trails Co. v. Ohio Dep't of Liquor Control*, 11 Ohio App. 3d 75, 462 N.E.2d 1386 (1983). The *Scioto Trails* court cited *Zugravu*

for the proposition that no property interest attaches because the license is revocable. *Id.*, 462 N.E.2d at 1389. However, the court later conceded in dicta that some limited due process protection may attach to liquor licenses. *Id.* at 1391. The court stated, however, that there could be no due process violation when citizens vote an entire precinct dry because the licensee may use the permit elsewhere. *Id.* Finally, in *Rickard v. Ohio Dep't of Liquor Control*, 29 Ohio App. 3d 133, 504 N.E.2d 724 (1986), another local option case, the court again conceded in dicta that due process may apply if the license holder could not transfer the license outside of the newly dry area. *Id.*, 504 N.E.2d at 729.

The Ohio cases cited by the defendants do not alter our conclusion that a liquor license is property. First, we emphasize that we do not rely on the labels that a state gives to the interests it has created. In deciding that Ohio liquor licenses were property for tax and bankruptcy purposes, we stated:

> Although it is true that the state has the right to decide what property interests it wishes to create, it cannot thwart the operation of the Tax Code by classifying the interests it has created as something other than property rights . . . . While several Ohio courts have refused to label the rights granted to the [liquor] licensee as "property rights," the state nonetheless has chosen to grant the licensee rights tantamount to property rights in all but name.

Terwilliger's, 911 F.2d at 1171-72 (footnote omitted).

As in *Terwilliger's*, we do not find persuasive the labeling applied by the Ohio courts. *Abraham* refers to permits that could not be transferred or sold, unlike current permits. *Zugravu*, *Scioto Trails*, and *Rickard* hold that the license is not property because the legislature can revoke it. According to this argument, the holder cannot complain about the state-provided deprivation procedures, however unreasonable and arbitrary, because those procedures are part of the interest that the holder knowingly obtained. While this

argument has some superficial appeal, the Supreme Court has explicitly rejected it.

> [I]t is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee . . . . The point is straightforward: the Due Process Clause provides that certain substantive rights — life, liberty, and property — cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (emphasis added; citations omitted).

An Ohio liquor licensee holds a substantial and valuable interest and has a claim to its continuation under state law. Accordingly, we hold that a holder of an Ohio liquor license has a property interest protected under the Due Process Clause.[4] Therefore, the state must accord a liquor licensee due process before revoking the license.

We must next determine whether the Ohio "particular premises" local option statute provides due process. We conclude that it does not.

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[4] We do not hold that a first-time applicant for a liquor license has a property interest. *See Shamie v. City of Pontiac*, 620 F.2d 118, 120 (6th Cir. 1980).

The fundamental problem with the Ohio "particular premises" law is the arbitrariness inherent in a referendum. In *Philly's v. Byrne*, 732 F.2d 87 (7th Cir. 1984), the court found that Illinois' local option liquor law did not violate the Due Process Clause. The law was a constitutional delegation of legislative power because

> [t]he voters must shut down all the retail liquor outlets in the precinct in order to shut down one . . . . This means not only that the licensee who is disliked is protected to some extent by the licensee who is liked but also that the voters cannot impose costs on liquor sellers without imposing costs on themselves — the costs of not being able to buy liquor in the precinct.

Id., 732 F.2d at 92 (emphasis supplied).

Unlike the law upheld in *Philly's*, the Ohio "particular premises" statute is not a valid delegation of legislative power because it allows the voters to permanently close only those establishments that they dislike. The Seventh Circuit in *Philly's* explained why such a targeted referendum would violate due process:

> The concern is that the voters might "gang up" to drive out of business a seller of liquor whom they disliked for reasons unrelated to any plausible public interest. This is a distinct type of arbitrary action that the requirement of fair procedure is designed to prevent, or at least make less likely to occur.

Id.

Five years after the decision in *Philly's*, Illinois amended its liquor control laws to allow for liquor license referendums targeted at particular establishments. Ill. Ann. Stat. ch. 43, para. 167. That provision was recently invalidated on due process grounds. *87 South Rothschild Liquor Mart v. Kozubowski*, 752 F. Supp. 839 (N.D. Ill. 1990). The *Kozubowski*

court adopted the reasoning of *Philly's* and added:

> [T]here is, as Judge Posner noted in *Philly's*, no criterion for peering beneath the voters' decisionmaking. But when voters pointedly single out a particular licensee, and do not target other licensees in the same precinct, the risk is no more and no less than that they are "gang[ing] up to drive out of business a seller of liquor whom they disliked for reasons unrelated to any plausible public interest." This is precisely the kind of capricious action that the due process of law provisions in the Constitution are designed to prevent.

Id. at 842 (quoting *Philly's* 732 F.2d at 92).

Finally, we note that the Ohio Court of Appeals, in upholding the Ohio local option law against due process challenges, has twice stated in dicta that a licensee might have a due process claim if the license could not be transferred out of the dry area. *Scioto Trails*, 462 N.E.2d at 1391; *Rickard*, 504 N.E.2d at 729. The "particular premises" law, by contrast, allows the voters to totally revoke the license.

The defendants argue that due process is satisfied by the requirement that a holder must be found to have violated a liquor law before a revocation referendum can be held. The problem with this argument is the lack of proportionality. The severity of the violation is completely unrelated to the possibility of a revocation referendum. The Ohio law allows the voters to subject a licensee to revocation simply because it is disliked, while a more popular licensee can escape revocation despite more frequent and more severe violations. Here, the state concluded that Brookpark deserved no penalty whatsoever for its violation, but Brookpark still was subjected to a revocation referendum. Brookpark alleges that a nearby establishment has been found to have violated the state liquor laws six times since 1981, but has never had its license put on the ballot.

We agree with the reasoning of the courts in *Philly's* and *Kozubowski* that such arbitrary targeting violates a licensee's due process rights. We therefore hold that the "particular premises" local option provisions of Ohio Rev. Code §§4301.321, 4301.331, 4301.352, and 4301.362 facially violate the Due Process Clause of the Fourteenth Amendment.

IV.

We also examine briefly Brookpark's other constitutional claims. Brookpark argues that the "particular premises" local option statute violates the Equal Protection Clause of the Fourteenth Amendment by singling out certain establishments for liquor license revocation. However, it is private citizens, not state actors, that determine which establishment's liquor license go on the ballot. Since all similarly situated liquor establishments are equally subject to a citizen-initiated petition drive, we agree with the district court that Brookpark failed to show any invidious state classification. We therefore affirm the dismissal of Brookpark's equal protection claim.

Brookpark also argues that the challenged sections of the Ohio liquor control law amount to a bill of attainder in violation of Article I, Section I0. In order to determine whether a statute is a bill of attainder, we must answer three inquiries:

> (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to furtner nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a [legislative] intent to punish."

Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 852 (1984) (citations omitted).

We agree with the district court that Brookpark has failed to show how the "particular premises" statute evinces a legislative intent to punish. We therefore affirm the dismissal

of Brookpark's bill of attainder claim.

Accordingly, we REVERSE the district court's dismissal and REMAND the case with instructions to enter a declaratory judgment that the challenged provisions of the Ohio liquor control law facially violate the Due Process Clause. We further instruct the district court to grant Brookpark appropriate injunctive relief and other relief as necessary. Finally, we instruct the district court to dismiss Brookpark's equal protection and bill of attainder claims.[5]

[5] The Secretary of State, the Director of Liquor Control, and Councilmember Miller all argue that they are not proper parties to Brookpark's complaint. If, on remand, the district court decides that Brookpark is entitled to relief beyond that given by a declaratory judgment, the court must decide against which defendants to order that relief. Therefore, we leave the question of which defendants are proper parties to the district court for its determination on remand.

FILED
KENNETH J. MURPHY
CLERK

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U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BROOKPARK ENTERTAINMENT, INC.
dba Crazy Horse Saloon,

Plaintiff, Case No. C2-90-793

-v-

SHERROD BROWN, et al.,

Defendants.

OPINION AND ORDER

This matter is before the Court pursuant to the motion of Plaintiff Brookpark Entertainment, Inc. ("Brookpark") for temporary and preliminary injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure. Brookpark asks for a restraining order enjoining Defendant Secretary of State Sherrod Brown ("Brown"), Ohio Department of Liquor Control Director John Hall ("Hall"), Cuyahoga County Board of Elections Member Robert Hughes ("Hughes"), Cuyahoga County Board of Elections Member John M. Coyne ("Coyne"), Cuyahoga County Board of Elections Member Thaddeus J. Jackson ("Jackson"), Cuyahoga County Board of Elections Member Roger M. Synenberg ("Synenberg"), and Cleveland City Councilman Dale Miller ("Miller"), their agents, servants, employees, attorneys and all other persons in active concert and participation with them from performing their respective

duties with regard to the November 6th, 1990, election on the question of whether the sale of spirituous liquor, mixed beverages, wine and beer by Brookpark in Precinct W of Ward 20 in the City of Cleveland should continue. Each individual is sued in his/her official capacity and as an individual.

In response to the motion, the Court held a hearing on October 25, 1990, wherein the parties were given the opportunity to place their respective positions and arguments on the record. Furthermore, at the hearing the Court Ordered that the defendants had until October 31, 1990, to submit memoranda in opposition. A memorandum in opposition was filed by Defendant Dale Miller; Defendants Sherrod Brown and John Hall filed a brief in opposition coupled with a motion for dismissal; and Defendants Robert Hughes, John M. Coyne, Thaddeus J. Jackson, Roger M. Synenberg, and the Cuyahoga County Board of Elections filed a Brief in Opposition to the Motion for Temporary Restraining Order/ Application for Preliminary Injunction.[1]

Specifically, Brookpark seeks a temporary restraining order to prevent the following:

a. counting or authorizing or ordering the counting of ballots,

b. certifying or authorizing or ordering the certifying of the results of an election, or

[1] It should be noted that the Brief in Opposition filed by and on behalf of Defendants Hughes, Coyne, Jackson, Synenberg, and the Cuyahoga County Board of Elections was filed, without leave of Court, beyond the October 31, 1990 deadline date set by the Court in the October 25, 1990 hearing. While this Court possesses the discretion to strike the brief for its failure to be filed within the Court's mandated time restraints and can find ample reason for doing so, the Court will nonetheless refrain from taking that course and as such the brief shall be taken under consideration.

c. notifying or authorizing or ordering the notifying of the Ohio Department of Liquor Control of the final results of a local option election regarding Brookpark's liquor permit.

Additionally, Brookpark wishes to enjoin Defendant Hall, the Director of the Ohio Department of Liquor Control, from cancelling and picking up the permit holder's permit as is required by Ohio Revised Code §4301.362, if a majority of the electors of the precinct vote "no" on the question presented at the election.

FACTS

The facts in the instant matter are essentially not in contention. Brookpark owns and operates a nightclub called the Crazy Horse Saloon at 16600 Brookpark Road in Cleveland, Ohio. The establishment sells alcohol pursuant to a series of class D permits issued to it by the Ohio Department of Liquor Control.[2] On October 1, 1989, Brookpark was cited by the Department of Liquor Control for selling beer upon the permit premises while the permit was under suspension, in violations of Ohio Rev. Code §4301.28 and §4301.58(B).

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[2] Specifically, the establishment has received a D-1 permit (Ohio Revised Code §4303.13) for retail sale by hotel, restaurant, club, amusement park, drugstore, lunch counter, boat, vessel, of beer by individual drink or in containers for consumption on or off premises; a D-2 permit (Ohio Revised Code §4303.14) for retail sale by individual glass or in containers for consumption on or off premises by hotel, restaurant, club, boat, or vessel, of wine and mixed beverages by individual glass or in containers for consumption on or off premises; a D-3 permit (Ohio Revised Code §4303.15) for retail sale by D-2 permit holder not previously holding D-1 permit, of beer by individual glass or in containers for consumption on or off premises; a D-3a permit (Ohio Revised Code §4303.15.1) for retail sale after 1:00 a.m. by a D-3 permit holder, or D-3 permit holders having D-1 or D-2 permits, of spirituous liquor, beer, wine and mixed beverages, furnishing music or entertainment; and a D-6 permit (Ohio Revised Code §4303.18.2) for Sunday sales (1:00 p.m. to midnight) under various liquor permits.

On October 24, 1989, The Ohio Liquor Control Commission found Brookpark in violation of Ohio Rev. Code §4301.28 for the sale of alcoholic beverages at the permit premises during the effective period stated in an order of suspension. The Commission ordered that no penalty be imposed.

Pursuant to Ohio Rev. Code §4301.32.1, if a permit holder has been found by the Liquor Control Commission to have violated any provision of Chapter 4301 or 4303, as Brookpark had, the electors of an election precinct may exercise the privilege of local option[3]

over the sale of alcohol by the holder of a class C or D permit. However, before the issue can even be placed on the ballot, and thus voted upon, it is incumbent upon a petitioner to circulate a petition. The petition must be signed by the electors of the precinct equal in number to thirty-five per cent of the total number of votes cast in the precinct for the office of governor at the preceding general election. *Ohio Rev. Code Ann.* §4301.33.1 (Anderson 1989). Councilman Miller and an individual not named in the case, Joyce Harris, circulated at least six (6) petitions among the electors of Cleveland's Ward 20, Precinct W. On August 23, 1990, once the requisite number of signatures were obtained the petitions were filed with the Cuyahoga County Board of Elections.

The Ohio Revised Code provides that a petition filed with the Board of Elections shall be open to public inspection. Ohio Rev. Code Ann. §4301.33.1 (Anderson 1989). The Code further provides that any elector who is eligible to vote on the question set forth on the ballot may file a timely protest against the local option petition. Upon the filing of the protest,

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[3] A "Local Option" is an option of self-determination available to a municipality or other governmental unit to determine a particular course of action without specific approval from state officials. *Black's Law Dictionary* 847 (5th ed. 1979). In the instant matter, as in most matters, "local option" refers to a method used in local elections to determine whether the selling and consumption of alcoholic beverages will be permitted.

the election officials with whom the petition was filed must promptly set a time and place for hearing the protest. At the set hearing, the election officials hear the protest and subsequently determine the validity of the petition. *Id.* The plaintiffs represented to the Court that counsel personally inspected the petition, compared those signatures found on the petition to those signature contained on voter registration cards, and concluded that pursuant to the relevant code sections, as they currently exist, the petition was in fact valid. Therefore, the plaintiff did not exercise their right to protest the petition.

Due to the accepted validity of the petition and the relevant Ohio law, the November 6, 1990 election ballot for Ward 20, Precinct W of the City of Cleveland will contain the following issue:

> Shall the sale of spirituous liquor, mixed beverages, wine and beer by Brookpark Entertainment, Inc., dba Crazy Horse Saloon at 16600 Brookpark Rd., Cleveland, Ohio 44135 be permitted in this precinct?

Barring an injunction, after the election, the Cuyahoga County Board of Elections will count the ballots and certify that either a majority voted "YES" to the issue, or voted "NO" to the issue. Regardless of how the majority of electors vote on the issue the results are to be certified by the Board of Elections. If in the event a majority vote "NO", the Ohio Department of Liquor Control will be notified of said result, and the Department will cancel and pick up Brookpark's liquor permits. Brookpark will receive no compensation for the loss of said permits, and the permits cannot be transferred for use in another precinct.[4] It is the cancellation of the liquor permits that have prompted plaintiff to request the issuance

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[4] The inability to transfer the permit is antithetical to the Ohio laws concerning a general local option election as provided for in Ohio Rev. Code §4301.32. If in the event an entire precinct is voted "dry", the permit holders are permitted to transfer their permits to other "wet" precincts.

of a temporary restraining order. The Court will now turn its attention to the standard to be applied.

STANDARD OF REVIEW

The standard of review for the issuance of a temporary restraining order, and ultimately a preliminary injunction, has regularly been asserted by the United States Court of Appeals for this circuit as follows:

> . . . whether the plaintiffs have shown a strong likelihood of success on the merits; whether the plaintiffs have shown irreparable injury: whether the issuance of a preliminary injunction would cause substantial harm to others; and where the public interest lies.

Adams v. Federal Express Corp., 547 F.2d 319, 323 (6th Cir. 1976), *citing North Avondale Neighborhood Ass'n v. Cincinnati Metro. Hous. Auth.*, 464 F.2d 486 (6th Cir. 1972). *Accord, Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 98 (6th Cir. 1982); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 564-65 (6th Cir. 1982); and *White Consol. Indus., Inc. v. Whirlpool Corp.*, 612 F. Supp. 1009 (S.D. Ohio 1985).

ANALYSIS

Before this Court is prepared to apply the above-referenced standard of review, it must first be satisfied that the case has proper jurisdiction before this Court. Federal Courts have jurisdiction to hear "federal questions" or "diversity of citizenship" cases. As the plaintiff properly noted, Federal Courts have the jurisdiction and are not in contravention with the 11th Amendment to award prospective relief against officials of the state and its agencies, enjoining them from violating federal rights and ordering them to conform their future conduct to the requirements of federal law. *Ex Parte Young*, 209 U.S. 123 (1908: *Edelman v. Jordan*, 415 U.S. 651 (1974); *Pennhurst State*

School & Hosp. v. Halderman, 564 U.S. 89 (1984); *Lee v. Western Reserve Psychiatric Habilitation Center* 747 F.2d 1062 (6th Cir. 1984); *Zielasko v. State of Ohio*, 873 F.2d 957 (6th Cir. 1989). However, this case needs a federal question before jurisdiction is properly before this Court. It is to this issue of jurisdiction that the Court will first turn its attention.

A. Jurisdiction

The plaintiff attempts to invoke federal question jurisdiction by alleging that the cancellation of the permits currently held by Brookpark would be in violation of Article I, §10 of the United States Constitution as a Bill of Attainder, a violation of the plaintiff's Fourteenth Amendment Equal Protection Clause rights, a violation of the plaintiff's Fourteenth Amendment Procedural Due Process rights, and a violation of Article II §§1 and 28 of the Constitution of Ohio. However, these alleged constitutional violations occur only if the permits are actually revoked. This Court is of the opinion that the clear and unambiguous interpretation of the relevant Ohio Revised Code sections in application to the facts particular to this case will not permit the revocation of the permits. Therefore, no federal question jurisdiction exist.

Ohio Rev. Code §4301.32.1 specifically provides as follows:

> The electors of an election precinct may exercise the privilege of local option over the sale of beer or intoxicating liquor by the holder of a class C or D permit at a particular premises situated within the precinct . . . if the holder of the permit has been found by the liquor control commission to have violated any provision of [Chapter 4301.] or Chapter 4303. or 4399. of the Revised Code within one year prior to the local option election. The privilege conferred by this section is in addition to and shall not be construed to conflict with the privilege conferred on the electors of the districts specified in section 4301.32 or 4305.14 of the Revised Code. (Emphasis added).

The parties do not dispute that the violation upon which this action is premised occurred on October 1, 1989. Furthermore, it cannot be in dispute that the election is scheduled to be held on November 6, 1990. Clearly, the election is being held beyond the one year limitation.

On the other hand, Ohio Revised Code §4301.33.1, the code section addressing the filing of the petitions, provides in relevant part as follows:

> The privilege of local option conferred by section 4301.321 [4301.32.1] of the Revised Code may be exercised if, not later than four p.m. of the seventy-fifth day before the day of a general or primary election, a petition together with a copy of a finding, order, or decision of the liquor control commission indicating that the permit holder has violated any provision of Chapter 4301., 4303., or 4399. of the Revised Code is presented to the board of elections of the county in which the precinct is situated. Such a petition is valid only if the violation of a provision of Chapter 4301., 4303., or 4399. of the Revised Code occurred within one year prior to the date on which the petition is presented to the board of elections. The petition shall be signed by the electors of the precinct equal in number to thirty-five per cent of the total number of votes cast in the precinct for the office of governor at the preceding general election for that office . . . If the board finds that the petition is valid, it shall order the holding of a special election in the precinct on the day of that general or primary election for the submission of the question set forth in section 4301.352 [4301.35.2] of the Revised Code. (Emphasis added).

Therefore, pursuant to this section and applying the relevant facts it is clear that the filing of the petitions on August 23, 1990 was proper and timely for the November 6, 1990 election. However, the fact that the petitions were filed in a timely fashion merely makes the petitions valid, it does not rectify

the fact that the election is not being held within one year of the violation as required by Ohio Rev. Code §4301.321. Therefore, the November 6, 1990, election is not timely in that the violation occurred over one year prior to the time set for the election. Therefore, as made amply clear by statute, for there to have been a valid filing of the petitions coupled with a valid election, the petitions would have needed to be filed in a timely fashion prior to the May primary elections.

Inasmuch as the application of the relevant state code sections will provide resolution to this matter, the Court need not address the constitutional issues set forth by the plaintiffs, and as such these issues are deemed MOOT and this matter is DISMISSED for lack of jurisdiction.

B. Constitutional Issues

As referenced above, although this matter need not be resolved on the constitutional issues raised, the Court will nonetheless briefly address the viability of these constitutional questions. Prior to the contemplation of any due process argument, a court must first be convinced that a property right exists.[5] It would appear that Ohio case law has repeatedly and consistently found that a property right does not exist with relation to a liquor permit. See, e.g. *Scioto Trails Co. v. Dept. of Liquor Control,* 11 Ohio App. 3d 75, 462 N.E. 2d 1386 (Ohio Ct. App. 1983) (motion to certify record to the Supreme Court of Ohio denied); *State, ex rel. Zugravu, v. O'Brien,* 130 Ohio St. 23 (1935) (provides that "[p]ermits

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[5] The fourteenth amendment to the United States Constitution, Section 1 provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

to carry on the liquor business . . . are mere licenses, revocable as therein provided, and create no contract or property right."; *Abraham v. Fioramonte,* 158 Ohio St. 213 (1952) ("[p]ermits issued by the Department of Liquor Control . . . are personal licenses and are not property which can be mortgaged or seized under execution . . ."); and *Rickard v. Dept. of Liquor Control,* 20 Ohio App. 3d 133 (1986). The Plaintiff fails to provide even a single Ohio case that finds contrary to those referenced above, and instead attempts to distinguish those cases from the instant matter by arguing that those cases are concerned with general local option elections rather than a particular local option election. While this may be true, the cases are cite for their treatment of the liquor permits as licenses, rather than as a property interest; therefore, the distinction is not well taken, and this Court would be hard pressed to find the existence of a property interest. As such, there can be no due process violation. Further, assuming arguendo that the permits were somehow deemed to be a property interest, this Court could find ample procedural due process contained within the Ohio Revised Code sections applicable to local options and the facts herein to satisfy the plaintiff's constitutional right.

It should also be noted that this Court, as the Sixth Circuit's Court of Appeals held in *Glicker v. Michigan Liquor Control Comm.,* 160 F.2d 96 (1947): "recognize[s] the right of a state to regulate, or even prohibit, through the exercise of its police power, the pursuit of certain businesses and occupations which because of their nature may prove injurious or offensive to the public. Such regulation is not prohibited by the Fourteenth Amendment." In *Scioto Trails, supra* at 79, that court provided an extremely compelling point when it stated as follows:

> Most importantly, as most of the cases have noted, plaintiffs accepted the liquor permit and commenced operation of the permit premises, including the sale of intoxicating liquors there, with the knowledge and understanding that the statutes of Ohio, and specifically R.C. 4301.32 *et seq.,* provide for the termination of the sale of intoxicating

> liquors at that location through the exercise of local option by means of a local-option election. In Ohio, every liquor permit owner takes his permit subject to the right of the residents of the territory within which the establishment is located to terminate any right to sell liquor within that territory and at the permit premises through the exercise of local-option election rights pursuant to statute.

With relation to the particular local option election being exercised in the instant matter, the permit holder not only accepts the permit with knowledge that it could be lost in a local option election, but also recognize they must first be cited by the Ohio Liquor Commission for a violation of the underlying relevant Ohio Revised Code Chapters. Therefore, the particular local option requires an additional improper act on behalf of the permit holder to even be placed in the perilous position of being singled out to lose the liquor permits.

The plaintiff's second argument is that their Fourteenth Amendment Equal Protection Clause rights are being violated. Under an Equal Protection Clause argument, based upon these facts, the relevant statutes are subject to a "rational relation" level of scrutiny. The rational basis test as applied to the relevant case and facts is clearly satisfied herein, given the interest of the State in regulating the issuance of liquor permits, the continued possession of liquor permits by their respective holders, and the proper determination of the ramifications for violations of the various permit holder requirements, rules and regulations. There also appears to be some question as to whether Cleveland City Councilman Dale Miller was acting in his personal capacity or as a City Councilman when he chose to circulate the petitions. If he was acting as a mere citizen, it would thereby eliminate the "acting under color of state law to deprive the plaintiff of its protected interests" as provided in the plaintiff's briefs. Further, this Court is of the opinion that in order for there to be an underlying equal protection argument, there must be some evidence to indicate that the actions taken by the Liquor Commission were unconstitutional. If the

evidence would show, which none has even been hinted at herein, that the Liquor Control Agents were issuing violations in such a way as to only single out the plaintiff, while these same violations by other tavern owners went unpunished, then possibly an equal protection argument could prevail. However, with no such evidence set forth before this Court, a local option election, promulgated by the electors, on behalf of the electors, is in no way an equal protection violation. Clearly this constitutional challenge must also fail.

The final constitutional challenge alleges that the relevant code sections constitute a bill of attainder. The Court is of the opinion that the code sections clearly fail to single out the plaintiff in an effort to punish the plaintiff. In fact, had the plaintiff not satisfied the condition precedent so as to even be the subject of a particular local option petition, then the statute would not even apply to the plaintiff. Therefore, the Bill of Attainder argument is not well taken.

For those reasons previously provided, the constitutional issues are deemed MOOT and therefore the instant matter is hereby DISMISSED for lack of jurisdiction.

IT IS SO ORDERED.

(signature)

GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

FILED
KENNETH J. MURPHY
CLERK

91 June-4 PM 4:52

U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BROOKPARK ENTERTAINMENT, INC.,
dba Crazy Horse Saloon,

Plaintiff,

v. Case No. C2-90-793

BOB TAFT, et al.,

Defendants.

OPINION AND ORDER

This matter is before the Court pursuant to the motion of Plaintiff Brookpark Entertainment, Inc., dba Crazy Horse Saloon ("Brookpark") requesting the Court to issue an order granting an injunction during the pendency of the appeal. This motion is brought pursuant to Rule 62(c) of the Federal Rules of Civil Procedure. On June 4, 1991, under S.D. Ohio R. 3.7.1 of the local rules, the Court held an informal conference in chambers, on the record, with all counsel present.

A. Facts

Essentially, the Court is revisiting the same case the Court addressed in November of 1990. At that time Brookpark was moving the Court for temporary and preliminary injunctive

relief pursuant to Rule 65 of the Federal Rules of Civil Procedure. Brookpark asked that the Court restrain the Secretary of State (at the time, Sherrod Brown; now, Bob Taft), the Ohio Department of Liquor Control Director John Hall, Cuyahoga County Board of Elections Member Robert Hughes, Cuyahoga County Board of Elections Member John M. Coyne, Cuyahoga County Board of Elections Member Thaddeus J. Jackson, Cuyahoga County Board of Elections Member Roger M. Synenberg, and Cleveland City Counselman Dale Miller, their agents, servants, employees, attorneys and all other persons in active concert and participation with them from performing their respective duties with regard to the local option election, that at the time was to be held on November 6, 1990.

Specifically, Brookpark sought to have the Court issue a temporary restraining order preventing the following:

a. counting or authorizing or ordering the counting of ballots, or

b. certifying or authorizing or ordering the certifying of the results of an election, or

c. notifying or authorizing or ordering the notifying of the Ohio Department of Liquor Control of the final results of a local option election regarding Brookpark's liquor permit.

Additionally, Brookpark requested that the Court enjoin the Director of the Ohio Department of Liquor Control from canceling and picking up the permit holder's liquor permit, in the event the precinct voted to revoke the permit.

The entire action surrounds the liquor permit of the Crazy Horse Saloon, a nightclub owned and operated by Brookpark. The establishment sells alcohol pursuant to a

series of class D permits issued to it by the Ohio Department of Liquor Control.[1] On October 1, 1989, Brookpark was cited by the Department of Liquor Control for selling beer upon the permit premises while the permit was under suspension, in violation of Ohio Rev. Code §§4301.28 and 4301.58(B).

On October 24, 1989, The Ohio Liquor Control Commission "found"[2] Brookpark in violation of Ohio Rev. Code §4301.28 for the sale of alcoholic beverages at the permit premises during the effective period stated in an order of suspension. The Commission ordered that no penalty be imposed.

Pursuant to Ohio Rev. Code §4301.32.1, if a permit holder has been found by the Liquor Control Commission to have violated any provision of Chapter 4301 or 4303, as Brookpark had, the electors of an election precinct may exercise the

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[1] Specifically, the establishment has received a D-1 permit (Ohio Revised Code §4303.13) for retail sale by hotel, restaurant, club, amusement park, drugstore, lunch counter, boat, vessel, of beer by individual drink or in containers for consumption on or off premises; a D-2 permit (Ohio Revised Code §4303.14) for retail sale by individual glass or in containers for consumption on or off premises by hotel, restaurant, club, boat, or vessel, of wine and mixed beverages by individual glass or in containers for consumption on or off premises; a D-3 permit (Ohio Revised Code §4303.15) for retail sale by D-2 permit holder not previously holding D-1 permit, of beer by individual glass or in containers for consumption on or off premises; a D-3a permit (Ohio Revised Code §4303.15.1) for retail sale after 1:00 a.m. by a D-3 permit holder, or D-3 permit holders having D-1 or D-2 permits, of spirituous liquor, beer, wine and mixed beverages, furnishing music or entertainment; and a D-6 permit (Ohio Revised Code §4303.18.2) for Sunday sales (1:00 p.m. to midnight) under various liquor permits.

[2] The Ohio Supreme Court has since ruled in *The State, Ex Rel. Brookpark Entertainment, Inc. v. Cuyahoga County Board of Elections*, No. 90-2255 (Decided May 29, 1991), that the liquor board has not made a "finding" for purposes of the statutes dealt with in the instant case until the date the commission's order was mailed. Therefore, the "finding" of a violation was not until November 16, 1989, the date the relevant order was mailed.

privilege of local option[3] over the sale of alcohol by the holder of a class C or D permit. However, before the issue can even be placed on the ballot, and thus voted upon, it is incumbent upon a petitioner to circulate a petition. The petition must be signed by the electors of the precinct equal in number to thirty-five per cent of the total number of votes cast in the precinct for the office of governor at the preceding general election. *Ohio Rev. Code Ann.* §4301.33.1 (Anderson 1989). Councilman Miller and an individual not named in the case, Joyce Harris, circulated at least six (6) petitions among the electors of Cleveland's Ward 20, Precinct W. On August 23, 1990, once the requisite number of signatures were obtained, the petitions were filed with the Cuyahoga County Board of Elections.

The Ohio Revised Code provides that a petition filed with the Board of Elections shall be open to public inspection. Ohio Rev. Code Ann. §4301.33.1 (Anderson 1989). The Code further provides that any elector who is eligible to vote on the question set forth on the ballot may file a timely protest against the local option petition. Upon the filing of the protest, the election officials with whom the petition was filed must promptly set a time and place for hearing the protest. At the set hearing, the election officials hear the protest and subsequently determine the validity of the petition. *Id.* The plaintiffs represented to the Court that counsel personally inspected the petition, compared those signatures found on the petition to those signatures contained on voter registration cards, and concluded that pursuant to the relevant code sections, as they currently exist, the petition

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[3] A "Local Option" is an option of self-determination available to a municipality or other governmental unit to determine a particular course of action without specific approval from state officials. *Black's Law Dictionary* 847 (5th ed. 1979). In the instant matter, as in most matters, "local option" refers to a method used in local elections to determine whether the selling and consumption of alcoholic beverages will be permitted.

was in fact valid.[4] Therefore, the plaintiff did not exercise their right to protest the petition.

Due to the accepted validity of the petition and the relevant Ohio law, the November 6, 1990 election ballot for Ward 20, Precinct W of the City of Cleveland was to contain and did in fact contain the following issue:

> Shall the sale of spirituous liquor, mixed beverages, wine and beer by Brookpark Entertainment, Inc., dba Crazy Horse Saloon at 16600 Brookpark Rd., Cleveland, Ohio 44135 be permitted in this precinct?

As previously stated, this Court issued an Opinion and Order wherein it was the opinion of this Court that "the clear and unambiguous interpretation of the relevant Ohio Revised Code sections in application to the facts particular to this case will not permit the revocation of the permits." This was based upon the Court's opinion that the "within one year" requirement of Ohio Rev. Code §4301.32.1 had not been satisfied and as such the election could not be held. Since an adequate remedy at state law existed there was no federal jurisdiction and this Court dismissed the action. *See,* Opinion and Order dated Nov. 6, 1990, at p. 8.

The Plaintiff has advised the Court that after the November 6, 1990, Opinion and Order was issued the plaintiff requested that the defendants refrain from certifying the election results, citing this Court's opinion. However, the plaintiff received no response, therefore the plaintiff was of the opinion that the potential actions of the Board of Elections in certifying any results could pose a substantial and imminent threat to the retention of the liquor permits.

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[4] The Ohio Supreme Court in *Ex Rel. Brookpark Entertainment, Inc.,* also found that the petitions had actually been submitted late based upon the date of the violation, August 7, 1989, and the fact that the petitions were not submitted until August 23, 1990, however, the Supreme Court noted, that the plaintiffs failed to contest the filing of the petitions.

In order to prohibit the defendants from going forward and certifying any results from the election, the plaintiff filed with the Ohio Supreme Court an original action in Prohibition or in the alternative, in Mandamus, and a motion for the issuance of an Alternative Writ. The Court issued the Alternative Writ prohibiting the certification of the election until the Court had had the opportunity to review the matter.

On May 29, 1991, in a written *per curiam* opinion, the Ohio Supreme Court denied the Writ of Prohibition and the Writ of Mandamus, thereby effectively concluding that the election results could properly go forward and be certified. It is based upon that ruling that the plaintiffs return to this Court asking that the constitutionality of the relevant statutes be determined. That issue had not previously been properly before this Court.

It should be noted that it is the understanding and belief of the parties that the majority of voters voted "No", thereby effectively revoking the license of the establishment if not enjoined.

STANDARD OF REVIEW

The standard of review for the issuance of a temporary restraining order, and ultimately a preliminary injunction, has regularly been asserted by the United States Court of Appeals for this circuit as follows:

> . . . whether the plaintiffs have shown a strong likelihood of success on the merits; whether the plaintiffs have shown irreparable injury; whether the issuance of a preliminary injunction would cause substantial harm to others; and where the public interest lies.

Adams v. Federal Express Corp., 547 F.2d 319, 323 (6th Cir. 1976), *citing North Avondale Neighborhood Ass'n v. Cincinnati Metro. Hous. Auth.*, 464 F.2d 486 (6th Cir. 1972). *Accord, Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977); *USACO Coal Co. v. Carbomin Energy,*

Inc., 689 F.2d 94, 98 (6th Cir. 1982); *Martin-Marietta Corp. v. Bendix Corp*, 690 F.2d 558, 564-65 (6th Cir. 1982); and *White Consol. Indus. Inc. v. Whirlpool Corp.*, 612 F.Supp. 1009 (S.D. Ohio 1985).

ANALYSIS

A. Constitutional Issues

A review of this Court's Opinion and Order dated November 6, 1990, will reflect that the instant case was dismissed for lack of jurisdiction, however, the Court opted, in dictum, to briefly discuss its thoughts on a variety of constitutional issues raised by the plaintiff. Now that the issue of the constitutionality of the relevant statutes is squarely before the Court, the Court hereby adopts that earlier analysis herein.

Prior to the contemplation of any due process argument, a court must first be convinced that a property right exists.[5] It would appear that Ohio case law has repeatedly and consistently found that a property right does not exist with relation to a liquor permit. *See, e.g. Scioto Trails Co. v. Dept. of Liquor Control*, 11 Ohio App. 3d 75, 462 N.E.2d 1386 (Ohio Ct. App. 1983) (motion to certify record to the Supreme Court of Ohio denied); *State, ex rel. Zugravu, v. O'Brien*, 130 Ohio St. 23 (1935) (provides that "[p]ermits to carry on the liquor business . . . are mere licenses, revocable as therein provided, and create no contract or property right."; *Abraham v.*

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[5] The Fourteenth Amendment to the United States Constitution, Section 1 provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fioramonte, 158 Ohio St. 213 (1952) ("[p]ermits issued by the Department of Liquor Control . . . are personal licenses and are not property which can be mortgaged or seized under execution . . ."); and *Rickard v. Dept. of Liquor Control,* 20 Ohio App. 3d 133 (1986). The Plaintiff fails to provide even a single Ohio case that finds contrary to those referenced above, and instead attempts to distinguish those cases from the instant matter by arguing that those cases are concerned with general local option elections rather than a particular local option election. While this may be true, the cases are cited for their treatment of the liquor permits as licenses, rather than as a property interest; therefore, the distinction is not well taken, and this Court would be hard pressed to find the existence of a property interest. As such, there can be no due process violation. Further, assuming *arguendo* that the permits were somehow deemed to be a property interest, this Court could find ample procedural due process contained within the Ohio Revised Code sections applicable to local options and the facts herein to satisfy the plaintiff's constitutional right.

It should also be noted that this Court, as the Sixth Circuit Court of Appeals held in *Glicker v. Michigan Liquor Control Comm.,* 160 F.2d 96 (1947): "recognize[s] the right of a state to regulate, or even prohibit, through the exercise of its police power, the pursuit of certain businesses and occupations which because of their nature may prove injurious or offensive to the public. Such regulation is not prohibited by the Fourteenth Amendment." In *Scioto Trails, supra* at 79, that court provided an extremely compelling point when it stated as follows:

> Most importantly, as most of the cases have noted, plaintiffs accepted the liquor permit and commenced operation of the permit premises, including the sale of intoxicating liquors there, with the knowledge and understanding that the statutes of Ohio, and specifically R.C. 4301.32 *et seq.,* provide for the termination of the sale of intoxicating liquors at that location through the exercise of local option by means of a local-option election. In Ohio,

> every liquor permit owner takes his permit subject to the right of the residents of the territory within which the establishment is located to terminate any right to sell liquor within that territory and at the permit premises through the exercise of local-option election rights pursuant to statute.

With relation to the particular local option election being exercised in the instant matter, the permit holder not only accepts the permit with knowledge that it could be lost in a local option election, but also recognize they must first be cited by the Ohio Liquor Commission for a violation of the underlying relevant Ohio Revised Code Chapters. Therefore, the particular local option requires an additional improper act on behalf of the permit holder to even be placed in the perilous position of being singled out to lose the liquor permits.

For purposes of the motion for an order granting injunction relief during the pendency of the appeal, the plaintiff places heavy reliance on the Sixth Circuit case of *In Re: Terwillinger's Catering Plus, Inc.*, 911 F.2d 1168 (6th Cir. 1990). That case is distinguishable in that the Appellate Court was addressing the issue of whether a liquor license is "property" to which a tax lien could attach or which could become part of a bankruptcy estate.

In reviewing the *Terwillinger's* case it becomes apparent that the Court of Appeals found a very limited "property interest" in a liquor permit within the meaning of the Bankruptcy Code. The Court also noted that "a liquor license constitutes 'property' or 'rights to property' within the meaning of federal tax lien law" *Id.* at 1171. Essentially, the Court found that a liquor license is "property" within the meaning of the tax lien statute, I.R.C. §6321. The Court did not, however, address a property interest for purposes of determining whether due process is then constitutionally guaranteed.

The plaintiff's second argument is that their Fourteenth Amendment Equal Protection Clause rights are being

violated. Under an Equal Protection Clause argument, based upon these facts the relevant statutes are subject to a "rational relation" level of scrutiny. The rational basis test as applied to the relevant case and facts is clearly satisfied herein, given the interest of the State in regulating the issuance of liquor permits, the continued possession of liquor permits by their respective holders, and the proper determination of the ramifications for violations of the various permit holder requirements, rules and regulations.

The Plaintiff also provides an argument that there may be an equal protection problem or an issue of selective enforcement. However, with no such evidence set forth before this Court, a local option election, promulgated by the electors, on behalf of the electors, is in no way an equal protection violation. Clearly this constitutional challenge must also failed. Furthermore, there has been nothing shown that would lead this Court to believe that there has been selective enforcement. The plaintiff cites to one other establishment that had been cited for a violation, however, was not made the target of a local option election. This fails in that it is the citation that would reflect selective enforcement and not the circulation of the petitions. In fact, were the plaintiff so inclined, they could circulate a petition to place the other establishment on the next primary or general election. For these reasons a selective enforcement argument is not well taken.

The final constitutional challenge alleges that the relevant code sections constitute a bill of attainder. The Court is of the opinion that the code sections clearly fail to single out the plaintiff in an effort to punish the plaintiff. In fact, had the plaintiff not satisfied the condition precedent so as to even be the subject of a particular local option petition, then the statute would not even apply to the plaintiff. Therefore, the Bill of Attainder argument is not well taken.

In reviewing the above arguments of the plaintiff, in light of the plaintiff's need to show a "strong likelihood of success on the merits", the plaintiffs' motion for an injunction during the pendency of the appeal is hereby DENIED.

IT IS SO ORDERED.

(Signature) _____

GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

FILED
LEONARD GREEN, CLERK
FEB. 20, 1992

Nos. 90-4130 and 91-3070

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BROOKPARK ENTERTAINMENT, INC.,
d/b/a CRAZY HORSE SALOON,

Appellant/
Cross-Appellee,

v. ORDER

BOB TAFT; JOHN HALL;

Defendants-Appellees/
Cross-Appellants,

and

ROBERT HUGHES; JOHN M. COYNE;
THADDEUS JACKSON: ROGER SYNENBERG;
DALE MILLER:

Defendants-Appellees.

Before: GUY, Circuit Judge; BROWN, Senior Circuit Judge; and CHURCHILL, Senior District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

*Honorable James P. Churchill, United States District Court for the Eastern District of Michigan, sitting by designation.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and adheres to its original decision, but concludes that three issues raised by the state merit further comment.

First, the state points out that Ohio Revised Code §§4301.321 and 4301.331 were amended in 1991 to provide for the possibility of referendums only where the Department has imposed a penalty against the establishment. Since no penalty had been imposed against Brookpark, no referendum would have been possible under the amended statute. Our holding only applies to the earlier version of the statute. We express no opinion as to the constitutionality of the amended statute.

Second, the state argues that the case has been mooted because in September 1991, after the submission of the parties' briefs in this case, an Ohio court upheld the revocation of Brookpark's liquor license. It is not clear whether this revocation was pursuant to the referendum election at issue in the present case. Brookpark argues, however, that its license already had been revoked pursuant to the election and the state court lacked jurisdiction to revoke a previously revoked license. Therefore, the state court ruling arguably does not moot the case. In any event, these subsequent proceedings are not a part of our record.

Third, the state complains that the panel raised and decided the constitutional issue *sua sponte.* We reject this contention. The state, in its brief to the panel, argued that the constitutional issues were ripe for adjudication and argued against remand.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

(Signature) _____
Clerk

A TRUE COPY
Attest:
LEONARD GREEN, Clerk

By (Signature) _____
Deputy Clerk

ISSUED AS MANDATE: February 28, 1992
COSTS: None

§4301.26 Cancellation of Permit.

The liquor control commission shall cancel permits issued pursuant to Chapters 4301. and 4303. of the Revised Code:

(A) When required to do so by section 4301.39 or 4301.362[4301.36.2] of the Revised Code;

(B) In the event of death or bankruptcy of the holder, the making of an assignment for the benefit of the creditors of the holder, or the appointment of a receiver of the property of the holder, except as otherwise provided in the rules of the department of liquor control relative to the transfer of permits.

[§4301.32.1] §4301.321 Local Option Concerning Particular Permit Premises.

The electors of an election precinct may exercise the privilege of local option over the sale of beer or intoxicating liquor by the holder of a class C or D permit at a particular premises situated within the precinct, except for a particular premises located at a convention center, if the holder of the permit has been found by the liquor control commission to have violated any provision of this Chapter or Chapter 4303. or 4399. of the Revised Code within one year prior to the local option election. The privilege conferred by this section is in addition to and shall not be construed to conflict with the privilege conferred on the electors of the districts specified in section 4301.32 or 4305.14 of the Revised Code.

[§4301.33.1] §4301.331 Petition For Election Concerning Particular Permit Premises.

The privilege of local option conferred by section 4301.321 [4301.32.1] of the Revised Code may be exercised if, not later than four p.m. of the seventy-fifth day before the day of a general or primary election, a petition together with a copy of a finding, order, or decision of the liquor control commission indicating that the permit holder has violated any provision of Chapter 4301., 4303., or 4399. of the Revised Code is presented to the board of elections of the county in which the precinct is situated. Such a petition is valid

only if the violation of a provision of Chapter 4301., 4303., or 4399. of the Revised Code occurred within one year prior to the date on which the petition is presented to the board of elections. The petition shall be signed by the electors of the precinct equal in number to thirty-five per cent of the total number of votes cast in the precinct for the office of governor at the preceding general election for that office and shall contain both of the following:

(A) A notice that the petition is for the submission of the question set forth in section 4301.352 [4301.35.2] of the Revised Code;

(B) The name of a class C or D permit holder and the address of the permit holder's permit premises. If the business conducted by a class C or D permit holder at the permit premises has a name different from the permit holder's personal or corporate name, the name of the permit holder's business shall be stated along with the permit holder's personal or corporate name.

Not later than the sixty-ninth day before the day of the next general or primary election, whichever occurs first, the board shall examine and determine the sufficiency of the signatures on the petition. If the board finds that the petition is valid, it shall order the holding of a special election in the precinct on the day of that general or primary election for the submission of the question set forth in section 4301.352 [4301.35.2] of the Revised Code.

A petition filed with the board of elections under this section shall be open to public inspection under rules adopted by the board.

An elector who is eligible to vote on the question set forth in section 4301.352 [4301.35.2] of the Revised Code or the permit holder named on the petition may, not later than four p.m. of the sixty-fourth day before the day of the special election at which the question will be submitted to the electors, file a protest against a local option petition. The protest shall be in writing and shall be filed with the election officials with whom the petition was filed. Upon the filing of the protest, the election officials with whom it is filed shall promptly fix a time and place for hearing the protest, and shall mail notice of the time and place for hearing it to the person who filed the petition and to the person who filed

the protest. At the time and place fixed, the election officials shall hear the protest and determine the validity of the petition.

Eff. 6-29-88

[§4301.33.1] §4301.331 Petition for Election Concerning Particular Permit Premises.

The privilege of local option conferred by section 4301.321 [4301.32.1] of the Revised Code may be exercised if, not later than four p.m. of the seventy-fifth day before the day of a general or primary election, a petition together with a copy of a finding, order, or decision of the liquor control commission indicating that the permit holder has violated any provision of this chapter or Chapter 4303. or 4399. of the Revised Code and has been assessed a penalty for such violation is presented to the board of elections of the county in which the precinct in which the particular premises at which the permit holder operates pursuant to the liquor permit that is the subject of such finding, order, or decision is situated.

The petition provided for in this section may consist of one or more separate petition papers. In addition to the requirements of this section, the petitions shall be governed by the rules set forth in section 3501.38 of the Revised Code.

The petitioner shall attach a copy of the finding, order, or decision of the commission to each petition paper he circulates. At the time he files the petition with the board of elections, the petitioner shall provide to the board of elections and affidavit certifying that at the time each signer affixed his signature to the petition, the petition paper contained a copy of the finding, order, or decision of the commission. A part petition paper circulated at any time without the finding, order, or decision of the commission attached to it is invalid. Failure of the petitioner to supply the affidavit required by this section invalidates the entire petition. The petition is valid only if the violation of a provision of this chapter or Chapter 4303. or 4399. of the Revised Code occurred within one year prior to the date of the election for which the petition is presented to the board of elections. The petition shall be signed by the electors of the precinct

equal in number to thirty-five per cent of the total number of votes cast in the precinct for the office of governor at the preceding general election for that office and shall contain both of the following:

(A) A notice that the petition is for the submission of the question set forth in section 4301.352 [4301.35.2] of the Revised Code;

(B) The name of a class C or D permit holder and the address of the permit holder's permit premises. If the business conducted by a class C or D permit holder at the permit premises has a name different from the permit holder's personal or corporate name, the name of the permit holder's business shall be stated along with the permit holder's personal or corporate name.

Not later than five days after a petition is filed under this section, the board shall give notice by certified mail that it has received the petition to the liquor permit holder whose permit would be affected by the results of the special election sought by the petition. Failure of the petitioner to supply a complete and accurate address of the liquor permit holder to the board of elections invalidates the petition. Not later than the sixty-sixth day before the day of the next general or primary election, whichever occurs first, the board shall examine and determine the sufficiency of the signatures on the petition and review, examine, and determine the validity of the petition. The board shall certify the sufficiency and validity of any petition determined to be valid. The board shall determine the validity of the petition as of the time of certification. If the board finds that the petition is valid, it shall order the holding of a special election in the precinct on the day of that general or primary election for the submission of the question set forth in section 4301.352 [4301.35.2] of the Revised Code.

A petition filed with the board of elections under this section shall be open to public inspection under rules adopted by the board.

An elector who is eligible to vote on the question set forth in section 4301.352 [4301.35.2] of the Revised Code or the permit holder named on the petition may, not later than four p.m. of the sixty fourth day before the day of the special election at which the question will be submitted to the

electors, file a protest against a local option petition. The protest shall be in writing and shall be filed with the election officials with whom the petition was filed. Upon the filing of the protest, the election officials with whom it is filed shall promptly fix a time and place for hearing the protest, and shall mail notice of the time and place for hearing it to the person who filed the petition and to the person who filed the protest. At the time and place fixed, the election officials shall hear the protest and determine the validity of the petition.

*HISTORY: 143 v. H 405. Eff 4-11-91.

[§4301.35.2] §4301.352 Form of Ballot for Election Concerning Particular Permit Premises.

If a petition is filed under section 4301.331 [4301.33.1] of the Revised Code for the submission of the question set forth in this section, a special election shall be held in the precinct as ordered by the board of elections under that section. The expense of holding the special election shall be charged to the municipal corporation or township of which the precinct is a part. At the special election the following question shall be submitted to the electors of the precinct:

"Shall the sale of . . . . . (insert a brief categorical description of the appropriate beverage) . . . . . by . . . . . (insert the permit holder's personal or corporate name, and if it is different from the permit holder's personal or corporate name, the name of the permit holder's business) . . . . . at . . . . . (insert the address of the permit premises) . . . . . be permitted in this precinct?"

The board of elections shall furnish printed ballots at the special election as provided under section 3505.06 of the Revised Code, except that a separate ballot shall be used for the special election. The question set forth in this section shall be printed on each ballot and the board shall insert in the question appropriate words to complete the question. Votes shall be cast as provided under section 3505.06 of the Revised Code.

[§4301.36.2] §4301.362 Effect of Election Concerning Particular Permit Premises.

If a majority of the electors voting on the question set forth in section 4301.352 [4301.35.2] of the Revised Code vote "yes," the sale of beer or intoxicating liquor by a class C or D permit holder at the specified premises shall only be subject to Chapters 4301. and 4303. of the Revised Code.

If a majority of the electors voting on the question set forth in section 4301.352 [4301.35.2] of the Revised Code vote "no," the board of elections shall notify the department of liquor control of the final result of the election by certified mail. When the department of liquor control receives notice of the final result of the election, it shall cancel and pick up the permit holder's permit within seven days.

The results of a local option election that is held in a precinct pursuant to section 4301.352 [4301.35.2] of the Revised Code shall not affect the results of a local option election that is held in the same precinct under section 4301.35, 4301.351 [4301.35.1], 4303.29, or 4305.14 of the Revised Code.

[§4303.27.3] §4303.273 Transfer of Location.

The department of liquor control shall not permit the transfer of location of a class C or D permit until it investigates the proposed new premises and finds that the transfer would not be detrimental for any of the reasons stated in section 4303.292 [4303.29.2] of the Revised Code. In an order permitting or denying such a transfer of location, the department shall state in writing, if it permits the transfer, why the transfer would not be detrimental, and if it denies the transfer, why the transfer would be detrimental. In making the finding required under this section, the department shall consider, in addition to the results of its own investigation, any testimony presented in a hearing that is held pursuant to section 4303.26 of the Revised Code.

An order permitting or denying the transfer of location of a class C or D permit is a public record and shall be open to public inspection at the office of the department. The department shall provide a copy of such an order to

any person upon request and may charge a reasonable fee not to exceed the cost of copying and delivering the order.

AMENDMENT XIV-CITIZENSHIP: PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or

comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE [XXI]

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Supreme Court, U.S.
FILED
JUN 19 1992
OFFICE OF THE CLERK

NO. 91-1880

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF OHIO, DEPARTMENT OF LIQUOR CONTROL,
Petitioner,

v.

BROOKPARK ENTERTAINMENT, INC.,

Respondent,

BRIEF OF BEECHCREST CENTER, INC., AS AMICUS CURIAE, IN OPPOSITION OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

WHETHER A LOCAL OPTION ELECTION, DIRECTED AT A SPECIFIC PREMISES, IS CONSTITUTIONAL, WHERE, AS A CONDITION PRECEDENT TO SUCH ELECTION, THE BUSINESS, AFTER NOTICE AND HEARING, HAS BEEN FOUND BY THE STATE LIQUOR CONTROL COMMISSION TO HAVE VIOLATED THE STATE'S LIQUOR CONTROL LAW.

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STATE OF OHIO, DEPARTMENT OF LIQUOR CONTROL
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BROOKPARK ENTERTAINMENT, INC.,
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BRIEF OF BEECHCREST CENTER, INC., AS AMICUS CURIAE, IN OPPOSITION OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Beechcrest Center, Inc. has consent of both parties to file this brief. (See appendix A-5, A-6)

OPINIONS BELOW

The opinion of the United States District Court Southern District of Ohio Western Division issued February 5, 1992 (See A-1) under the name of *Beechcrest Center, Inc. v. John*

Hall, et al., Case No. C-1-91-792, is not reported, but appealed to the Sixth Circuit Court, Case No. 92-3236 and being held in abeyance pending the out come of *Brookpark Entertainment, Inc.*, Respondent's case. (See A-3, A-4).

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was issued on February 20, 1992. The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. §1254(1). (U.S. Supreme Court Rule 37 to answer a Writ of Certiorari with an Amicus Curiae Brief.)

STATUTES INVOLVED

The statutes involved in this case are Ohio Rev. Code §§4301.321, 4301.331, 4301.352, 4301.362 and 4303.271. Additionally for this Court's consideration are Amendments XIV and XXI of the U.S. Constitution.

THE INTEREST OF AMICUS CURIAE

Beechcrest Center, Inc. has a strong interest in opposing the State of Ohio's Petition for Writ of Certiorari. Respondent, Brookpark Entertainment Center, Inc. has decided not to file a brief in opposition to State of Ohio's Writ, thus Beechcrest Center, Inc. is compelled to do so as *Beechcrest Center, Inc. v. John Hall*, Case No. C-1-91-792, was appealed to the Sixth Circuit Court of Appeals from the Federal District Court by the State of Ohio, Department of Liquor Control, but is being held in abeyance pending the disposition by the U.S. Supreme Court in *Brookpark*. (See appendix A-3, A-4). In *Beechcrest Center, Inc. v. John Hall, et al.*, the Ohio Department of Liquor Control and

Ohio Liquor Commission were permanently enjoined from enforcing the results of a November 7, 1989 option election that was found to be unconstitutional on February 5, 1992. This disposition was responsive to the December 16, 1992 finding of the United States Court of Appeals for the Sixth Circuit that the Ohio particular premises local option election statute was in violation of the federal Constitution's 14th Amendment Due Process Clause. *Brookpark Entertainment Center, Inc. v. Taft*, Case Nos. 90-4130/ 91-3070 (6th Cir., Dec. 16, 1991). The legal issues in both cases are identical. Both permit holders, Beechcrest Center, Inc., dba Mingles, and Brookpark Entertainment Center, Inc., dba Crazy Horse Saloon, were found to have violated Ohio liquor law, yet in neither case was a penalty assessed. Both permit holders were placed on the ballot in their respective precincts and the vote was to cancel their permits. Beechcrest is presently operating on its Ohio liquor licenses while Brookpark is not.

REASONS FOR NOT GRANTING THE WRIT

A. THERE EXISTS NO INTRACTABLE CONFLICT AMONG THE CIRCUITS

The decision of the United States Court of Appeals for the Sixth Circuit is correct and fully consistent with the decision of the United States Court of Appeals for the Seventh Circuit, the only other circuit court to address targeted referenda such as the Ohio "particular premises" statute. In *Philly's v. Byrne*, 732 F.2d 87 (7th Cir. 1984), the court noted:

> The concern is that the voters might "gang up" to drive out of business a seller of liquor whom they disliked for reasons unrelated to any plausible public interest. This is a distinct type of arbitrary action that the requirement of fair procedure is designed to prevent, or at least, make less likely to occur. (Citations omitted). It is therefore relevant to point out that the Illinois act does not permit the precinct's voters to single out a particular liquor seller to shut down. Id. at 92;

It is this logic upon which the Sixth Circuit rested its determination that the Ohio "particular premises" local option statute fails

to provide due process. *Brookpark Entertainment Center, Inc. v. Taft, et al.*, 951 F.2d 710 (6th Cir. 1992).

Petitioner fears "that by defining the question as the process due to prevent arbitrariness, the court invites the prospect that other local option elections may be rejected." (Petition for Writ of Certiorari at 11.) A review of the decision in *Philly's* should allay petitioner's fears. Although, the Seventh Circuit expressed concern over particular premises option elections, the court found that Illinois' local option law did not violate the Due Process Clause based on the fact that Illinois' law required voters to "shut down all the retail liquor outlets in the precinct in order to shut down one." Thus, it is only those option elections which deprive license holders of their constitutional due process which are in danger of rejection.

Ohio currently, is the only state that has a particular premises option election. Of the 50 states together with the District of Columbia, 36 have local option election legislation and of those 36 states, 89% deal with political subdivisions larger than a precinct classification. The state of Texas, Kentucky, Illinois and Ohio are the only states which allow local option elections in a political subdivision as small as a precinct. (Tex. Alco. Bev. Code Ann. §25.11, Ky §242.125, Ill. Rev. Stat. Ch. 43 §9.)

The Ohio targeted referendum statutory scheme is, in fact, an exercise in adjudication, not legislation, and it cannot stand the test of the constitutions commitment to procedural regularity and substantive fairness.

Whether an action is taken pursuant to a vote directly by the electorate or by a vote of the legislature, that action must comply with all constitutional norms and constraints. "It is irrelevant that the voters rather than a legislative body [adopted the measure], because voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981). See also, *Hunter v. Erickson*, 393 U.S. 385, 392 (1969) ("The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed"); *Lucas v. Colorado General Assembly*, 377 U.S. 713, 737 (1964) ("the fact that a challenged [action] was approved by the electorate is without federal constitutional

significance, if the scheme adopted fails to satisfy the basic requirements of the [Constitution]"). Once this principle is recognized, it becomes obvious that Ohio Revised Code §§4301.26, 4301.321, 4301.331, 4301.352, 4301.362 and 4303.273 cannot stand. For it is hard to imagine a scheme which deprives a property holder of its rightful interests with less due process of law than the scheme created by the above statutes.

In *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983), the Seventh Circuit reviewed Illinois' liquor regulation system to determine "whether under Illinois law, a liquor license is securely and durably the licensee's." Id. at 948. Based on its evaluation of the illinois licensing system, the court not only held that holders of liquor licenses enjoy constitutionally protected property interests in their licenses, but held that applicants for renewal of licenses hold constitutionally protected property interests as well. Id. at 949.

In a number of cases since *Reed*, the Seventh Circuit and courts in the Northern District of Illinois have reaffirmed that Illinois liquor licenses constitute property interests for purposes of the federal constitution. See *Philly v. Byrne*, 732 F.2d 87, 89-90 (7th Cir. 1984) ("an Illinois liquor license is property within the meaning of the Fourteenth Amendment"); *Mirshak v. Joyce*, 652 F. Supp. 359, 367 (N.D. Ill. 1987) (Williams, J.). *87 Rothchild Liquor Mart v. Kozubowski*, 752 F. Supp. 839 (N.D. Ill. 1990).

Under Ohio Revised Code §§4301.26, 4301.321, 4301.331, 4301.352, 4301.362 and 4303.273, liquor licenses may be revoked by a simple majority of a precinct's voters for any or no reason. This provision is wholly inconsistent with the dictates of the Due Process Clause and the Constitution's commitment to fairness: it provides no process for the affected permit holders; no safeguards against arbitrary or even invidious action by the voters, and no opportunity for review of the decision. The Due Process Clause does not allow divestment of just a few individual property interests to turn on popularity contests, whether those contests are labelled legislative or adjudicative decisions.

It has long been held, of course, that bodies enacting general legislative rules need not adhere to the conventional procedures that due process typically requires of governmental action that focuses on a specific individual, depriving him of a property

interest. In *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915), for example, Justice Holmes explained that where government is passing "[g]eneral statutes"--in that case an across-the-board increase in the valuation of all taxable property in the City of Denver--due process does not require that every person whose property will be affected must be given a chance to be heard. It is clear, though, that the targeted referendum leaving out certain permit holders cannot seek refuge under any relaxed standard of legislative due process. For the targeted referendum is the antithesis of general legislation; it focuses on a specific tavern owner which alone will suffer the burdens of the enactments. Even as he declared the rule in *Bi-Metallic*, Justice Holmes distinguished cases involving individualized decisions.

> "In *Londoner v. Denver*, 210 U.S. 373, 385 (1908), a local board had to determine 'whether, in what amount, and upon whom' a tax for paving a street should be levied for special interests. A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing." *Bi-Metallic*, 239 U.S. at 445-446.

One need not go back to *Bi-Metallic* and *Londoner*, however, to show how inapplicable the relaxed rules of legislative due process are to this case.

B. THE SIXTH CIRCUIT'S ANALYSIS COMPORTS WITH PRECEDENT

The framework for a procedural Due Process case is well-settled. It was correctly employed by the panel below to strike down Ohio's particular premises liquor option election as unconstitutional. As such, no reason exists to invoke the Supreme Court's discretionary power of review to upset that panel's decision.

To prove the Sixth Circuit's fidelity to precedent, it is necessary to review a procedural Due Process analysis, which begins with a finding of the requisite state action to trigger the com-

mands of the 14th Amendment. Civil Rights Cases, 109 U.S. 3 (1883) (holding that the 14th Amendment was intended as a limit against public, not private, conduct). When the state, or an actor sufficiently linked to the state, is acting, the 14th Amendment mandates that the substantive right to property be maintained unless adequate procedures exist to justify a deprivation. Of course, that begs the question of how to define both property and process due. In *Board of Regents v. Roth*, 408 U.S. 564 (1972) the Court elaborated on property as "defined by existing rules or understandings that stem from an independent source such as state law -- rules of understandings that secure certain benefits and that support claims of entitlement to those benefits." Furthermore, because of its locus in the 14th Amendment, the determination as to whether an independently created entitlement is Due Process property is one for the federal judiciary to make. *Memphis Light, Gas and Water v. Craft*, 436 U.S. 1, 9 (1978). Upon a conclusion that a protectable property interest was infringed, it must be decided whether the infringement was pursuant to the minimum process due. A deprivation can be entirely legitimate when minimum process due exists. *Daniels v. Williams*, 474 U.S. 327 (1986) (Stevens, J., concurring). The process due, however, is not subject to talismonic definition. It is contingent upon circumstances and the interests of both the government and the putative victim of the unconstitutional deprivation. *Goldberg v. Kelly*, 397 U.S. 254 (1970). Throughout this balancing act, the rationales which undergird Due Process protection, the interest in achieving a rational result, accountability and an adequate explanation for the government's decision, must be foundational. L. Tribe, American Constitutional Law (1988 2d ed.).

In coming to its decision, the court below faithfully subscribed to the above analysis. Failure to conform to Supreme Court precedent is not, therefore, an adequate reason to justify the granting of Certiorari.

C. PETITIONER'S BRIEF IS FATALLY FLAWED

Petitioner's Writ is fatally flawed, contrary to Supreme Court precedent, contrary to that precedent as applied by the various Circuits of the United States Court of Appeals and contrary to logic.

The State advances a legal theory opposed to the familiar premises that the federal courts are empowered, for purposes of the Fourteenth Amendment's Due Process Clause, to characterize the substance of state preferred entitlement. Petitioner's argument notwithstanding, it is federal law which controls the analysis as to whether a state entitlement rises to the level of property within the meaning of Due Process.[1] *Memphis Light, Gas & Water v. Craft*, 436 U.S. 1, 9 (1978). Thus, petitioner's reliance on Ohio decisional law, which has consistently labeled liquor licenses as a revocable privilege and not property, is misplaced. It is too late in the day to argue that Ohio courts can give dispositive construction to federal Constitutional clauses. See *Marbury v. Madison*, 5 U.S. 137 (1803) (it is the power of the federal judiciary to say what the law is); *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) (extending *Marbury* so as to reserve conclusive interpretative power over the federal Constitutional to the federal courts).

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[1] State statutory entitlements are protectable interests within the context of procedural Due Process. Goldberg v. Kelly, 397 U.S. 254 (1970). In that opinion it was noted that "[i]t may be realistic today to regard welfare entitlement as more like property than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common law concepts of property." Id. at 255. See also Bell v. Burson, 402 U.S. 535, 539 (1971) (holding that a driver's license is a sufficient interest so as to trigger a Due Process hearing); Barry v. Barchi, 443 U.S. 55, 64 (1979) (a horse trainer's license is Due Process property within the meaning of the Clause). This body of case law had its genesis with Commentator Charles Reich's seminal article The New Property, 73 Yale L.J. 733 (1964) where it was contended that:

> One of the most important developments in the United States during the past decade has been the emergence of government as a major source of wealth. Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises and licenses. Government has always had this function. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale. Id. at 768-71.

For an earlier appreciation of this same phenomena, see Pound, The New Fuedal System, 19 KY L.J. 1 (1930). Ohio's licensing regime must be viewed within the parameters of this contemporary diminution of individual security.

Petitioner goes on to concede the *Memphis* principle, arguing instead that the Sixth Circuit misapplied the law by placing undue emphasis on its prior decision in *Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168 (6th Cir. 1990). (Petitioner's Writ of Certiorari at 7) There, the Sixth Circuit concluded that an Ohio liquor license is property within the context of both the Bankruptcy Code and the federal tax lien statute. Id. at 1171-72. Petitioner seeks to distinguish *Terwilliger's* from the case at bar on the supposition that property in the Due Process sense is distinct from that envisioned by the Bankruptcy Code or the tax lien statute.[2] This is a distinction without a difference. Both courts looked to Ohio statutory law for indicia of property as contemplated by the traditional connotation of that term, not in a particularized manner that would make property in one sense different from another. In fact, the *Terwilliger's* court acknowledged that "[t]he term "property" is not defined by the tax lien statute . . ." Id. at 1171. It then proceeded to analyze the Ohio's statutory scheme, finding as determinative the following facts:

> . . . Ohio allows a liquor license to be transferred, sold, inherited and renewed. See generally, Ohio Rev. Code Ann. Sections 4303.26, 4303.271 and 4303.273 (Anderson 1988) and Ohio Admin. Code Section 4301:1-1-14. It is undeniable that a liquor license has pecuniary value to its holder to sell alcoholic beverages and can be sold for value. Since the state has vested the owner of a liquor license with these beneficial interests, a liquor license constitutes "property" or rights to property within the meaning of the federal tax lien law. Id. at 1171.

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[2] Although petitioner asserts a distinction between Terwilliger's focus, the Bankruptcy Code and the tax lien statute, and the Court's focus in the case sub judice, the Due Process Clause, it fails to mention the significance of the distinction. Thus, it appears as a hollow, meaningless observation.

In *Brookpark*, the court noted that "[i]n addition to the rights to transfer, sell, bequeath, and renew, a holder of an Ohio liquor license also has the right to appeal and adverse determination of the Department." *Brookpark* supra. at 8, (citations omitted). Both courts maintained a common conception of property, in either its statutory or procedural Due Process persona, justifying the panel's use of *Terwilliger's*.

Also, petitioner disputes the *Terwilliger's* analysis on the grounds that it ignored aspects of Ohio's liquor licensing regime so as to distort the substantive nature of an Ohio liquor license. As can be gleaned from the discussion above, that claim lacks merit. Surely the court below was justified in concluding that a Due Process property interest attached to respondent's liquor license on the weight of the factors it enumerates.

In Section II of petitioner's Writ at 8-9, petitioner posits that respondent's concededly protectable property interest is tempered by the particular premises referendum. In other words, the Ohio Assembly, in granting a property interest with liquor licenses, reserved the right of revocation to the people in the relevant precinct as part of that property interest. On this point, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) is controlling:

> The point is straightforward: the Due Process Clause provides that certain substantive rights -- life, liberty, and property --cannot be deprived except pursuant to constitutionally adequate procedures. **The categories of substance and procedure are distinct**. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by **the procedures provided for its deprivation** any more than can life or liberty. The right to due process is conferred, not by legislative grace, but by constitutional guarantee. Id. at 541 (emphasis added).

Thus, procedure cannot be collapsed into substance. Petitioner's argument that the referendum is a component of the bundle of rights and obligations conferred to a liquor licensee involves a perfect example of the forbidden mix of substance and procedure. Because the referendum is the procedure employed for license revocation, any analysis that combines that referen-

dum with respondent's substantive property interest would be precluded. *Loudermill*, supra..

A positivist approach, such as the type advanced by petitioner merging the deprivation mechanism with the property interest, ignores the primacy of federal Constitutional law over state statutory law.[3] Ohio can no more define Due Process through its construction of statutory entitlement than it can define property within the meaning of that Clause through its judicial institutions. The federal courts have that responsibility. Art. VI, Sect. 1, cl. 1. Additionally, by characterizing the referendum as informing the property interest, petitioner ignores the settled two-tiered analysis for procedural Due Process cases by circumventing the second-tier: the inquiry as to whether the process given is the process due. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976).

Petitioner's attempt to explain away *Loudermill*, see petitioner's Writ of Certiorari at 9, is not persuasive since its circular logic brings *Loudermill* back into play as the on-point, controlling case: ". . . the starting point is still what interest exists . . . If an interest is conferred at all it is expressly made subject by statute to the ability of the people to enact a prohibition upon local referendum." Again, its distinction notwithstanding, petitioner's argument is one where process amalgamates with substance.

At petitioner's Writ of Certiorari at 9, petitioner again concedes the property interest but instead argues that Ohio's statutory scheme offers all the process due. Petitioners confers a talismanic quality to the notice provided by statute that the Ohio liquor license has a potential to be canceled upon the event of a violation of Ohio's liquor control law. A violation, no matter how inconsequential, can trigger a petition and referendum with the purpose of revoking that license. Notice, however, has never been considered a talisman in determining the process due. This Court has insisted, on more than one occasion, that the procedural methodology be free to meet the exigencies of each unique situation. See *Hannah v. Larch*, 363 U.S. 420, 442 (1960); *Morissey v. Brewer*, 408 U.S. 471, 481 (1972).

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[3] An academic attack on the positivist approach can be found in Redish & Marshall, 95 Yale L.J. 455, 459-63.

The court below found as dispositive "the arbitrariness inherent in a referendum." *Brookpark*, at 11.; and, far from ignoring the statute's notification to liquor licensees of the potential deprivation, the court concluded that even with notice "the problem [with Ohio's particular premises referendum] is the lack of proportionality. The severity of the violation is completely unrelated to the possibility of a revocation referendum." Id. at 13. Precedent fully permits this type of balancing.

Additionally, petitioner takes issue with the Sixth Circuit's use of *87 South Rothchild Liquor Mart v. Kozubowski*, 752 F. Supp. 839 (N.D. Ill., 1990) as persuasive precedent. (Petition for Writ of Certiorari at 9) This case was cited by the Sixth Circuit Court to demonstrate the constitutional infirmities inherent in a particular premises liquor option election, namely the potential for discriminatory treatment against disliked licensees, and not for the premises that Ohio's option law is an exact facsimile of the one in Illinois. Again, petitioner elaborates on an irrelevant distinction.

Thereafter, at Petition for Writ of Certiorari at 10, petitioner argues that the local option election upheld in *Rippey v. Texas*, 193 U.S. 504 (1904) should have bound the court below. Petitioner characterizes the *Rippey* holding as supported by the substantive power of a state assembly to modify rights it has the power to obviate completely. Yet, the "greater includes the lesser" approach no longer carries the constitutional punch it once did. For purposes of illustration, consider that while Ohio has no constitutional duty to provide for public education, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), it cannot condition attendance in the public schools on belonging to a particular race, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), or upon a morning recitation of the pledge of allegiance, *West Virginia State Board of Education V. Barnette*, 319 U.S. 624 (1943). Analogously, it would follow that while the states may limit or totally prohibit the sale of alcohol, they cannot do so arbitrarily. This is a premise flowing from the paramount, post-Civil War constitutional principle that the Fourteenth Amendment speaks to what government cannot do, acting as an external barrier to state action that concededly has its origin in legitimate, affirmative power. Therefore, even though

petitioner frames the argument in the posture of the Twenty First Amendment as a font for state power, the Fourteenth Amendment's procedural Due Process Clause intervenes since the state has gone too far. *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1972) (holding that the Twenty First Amendment did not modify the 14th Amendment).

Additionally, petitioner fails to account for the fact that the particular premises scheme, struck down in both the Sixth and Seventh U.S. Circuit Courts of Appeals, is different from the general "wet/dry" scheme upheld in *Rippey*. This fact alone can reconcile the holding in *Rippey* with the case sub judice. When a revocation moves from the general (for example, a state-wide, city-wide or county-wide ban on the sale of alcohol) to the specific (respondent's liquor license deprivation), especially in an area as small as a precinct consisting of only 5 or 6 streets, the interest in due process is heightened. *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 800-801 (1980) (Blackmun, J., concurring). For it follows that the general affects all, even decision-makers, while, comparatively, the specific insulates decision-makers from the consequences emanating from their actions. Indeed, it is on that doctrine that this case and Judge Posner's Seventh Circuit decision of *Philly's v. Byrne*, 732 F.2d 87 (7th Cir. 1984) holds. In *Philly's*, the Seventh Circuit upheld Illinois's general wet/dry liquor option election against a procedural Due Process attack. Importantly, however, it anticipated Ohio's particular premises scheme and the constitutional problems it would raise:

> "The concern is not that the voters of a precinct might make a mistake in deciding to ban the retail sale of liquor; when they vote on the question they are voting their personal values and there is no criterion by which a court or other outsider could judge their decision correct or incorrect. The concern is that the voters might "gang up" to drive out of business a seller of liquor whom they disliked for reasons unrelated to any plausible public interest. This is a distinct type of arbitrary action that the requirement of fair procedure is designated to prevent, or at least make less likely to occur...."

"It is therefore relevant to point out that the Illinois act does not permit the precinct's voters to single out a particular liquor seller to shut down.... The precinct can choose only between allowing and not allowing the retail sale of alcoholic beverages...."

"The voters must shut down all retail liquor outlets in the precinct in order to shut down one and they must shut them down for four years because a new referendum cannot be held before that period has elapsed. This means not only that the licensee who is disliked is protected to some extent by the licensee who is liked but also that the voters cannot impose costs on liquor sellers without imposing costs on themselves-costs of not being able to buy liquor in the precinct."

"The requirement that the precinct electorate act across the board shows that the judgment the voters are asked to make is legislative rather than adjudicative in character." Id. at 92.

A referendum must be more general than not: i.e., a particular zone must choose between allowing or not allowing the sale of alcoholic beverages by all its retailers. The fact that a statute applies across the board provides a substitute safeguard against impermissible discrimination. *United States v. Florida East Coast Ry.*, 410 U.S. 224, 93 S.Ct. 810. The Sixth and Seventh Circuits both embrace procedural Due Process as evincing a concern for achieving fair and rational results.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be denied.

Barbara R. Wiethe

Respectfully submitted,

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as Amicus Curiae

DATED: June 19, 1992

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

SOUTHERN DISTRICT OF OHIO - WESTERN DIVISION

BEECHCREST CENTER, INC.
dba Hingles,

V

JOHN HALL, et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER C-1-91-792

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to [redacted] hearing before the Court. The issues have been [redacted] heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

the defendants are hereby permanently enjoined from enforcing the results of the unconstitutional local option election against Beechcrest Center, Inc.

5 FEB 1992
Date

KENNETH J. MURPHY
Clerk

(By) Deputy Clerk

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Supreme Court, U.S.
FILED
JUL 13 1992
OFFICE OF THE CLERK

No. 91-1880

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF OHIO, DEPARTMENT OF LIQUOR CONTROL,
Petitioner,

v.

BROOKPARK ENTERTAINMENT, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO BRIEF OF BEECHCREST CENTER, INC., AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A LOCAL OPTION ELECTION, DIRECTED AT A SPECIFIC PREMISES, IS CONSTITUTIONAL, WHERE, AS A CONDITION PRECEDENT TO SUCH ELECTION, THE BUSINESS, AFTER NOTICE AND HEARING, HAS BEEN FOUND BY THE STATE LIQUOR CONTROL COMMISSION TO HAVE VIOLATED THE STATE'S LIQUOR CONTROL LAW.

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U.S. Const. Amend XXI 1, 3

REPLY ARGUMENT IN SUPPORT OF GRANTING WRIT OF CERTIORARI

Respondent, Brookpark Entertainment, Inc., has not filed a reply brief, but instead has filed a letter with the Clerk waiving their right to respond. In that letter, respondent gratuitously argues the worthiness of the present petition on the ground that petitioner did not appear in oral argument before the Court below. The case started as a challenge to an election and in the Court below, the Ohio Secretary of State presented constitutional arguments as to its validity. Presumably because the election has long since been held and this case deals only with the collateral consequences of that election, the Secretary of State is not a party to the petition. Petitioner, however, still has a most viable interest in whether cancellation of the liquor license, commanded by that election, is required or not.

In place of a brief by respondent, Beechcrest Center, Inc. has filed a brief in opposition to the petition as an amicus curiae. Petitioner consents to the filing of the brief, amicus curiae. The brief shows that the issue in this case is not isolated. The brief also demonstrates the tension between the due process analysis of the Court below and the State's power to enact legislation consistent with the 21st Amendment to the Constitution. The petition asks the Court to explore the boundaries of that tension.

Amicus presents several arguments why certiorari should not be granted. First, amicus argues there is no conflict with the circuits, citing to *Philly's v. Byrne,* 732 F.2d 87 (7th Cir. 1984) as not being inconsistent with the decision of the Court below. However, petitioner never argued a conflict of decisions. The Court should grant certiorari because the decision of the Court below is novel and unprecedented. What the Court below did was take arguments in *Philly's* in support of why a different option election was constitutional and convert such argument into its holding in this case why Ohio's law was unconstitutional. Certiorari is not sought because the Sixth Circuit decision is different

than some other circuits. The Court below's decision is erroneous in its own right.

Amicus next argues that other local option election schemes may not be affected by the precedent of "defining the question as the process due to prevent arbitrariness". As pointed out in the petition, it may be just as arbitrary to close all liquor establishments within a geographical area in order to shut down one establishment where there has been no showing that any of the liquor establishments have violated the law, as it is under the Ohio regulatory scheme to allow the voters to single out one of many liquor establishments, each of whom has been found to have violated the law. The precedent of "proportionality" established by the Court below, if allowed to take root, could effectively override the powers of the people, under the 21st Amendment, to regulate the sale of liquor through option elections. *Rippey v. Texas,* 193 U.S. 504 (1904).

Amicus next argues that the rule of *Bi-Metallic Investment Co. v. State Bd. of Equalization,* 239 U.S. 441 (1915), dealing with the process due under legislative enactments is not applicable. Amicus' analysis however, makes a quick transition from the general to the specific. Amicus argues that the targeted option election is the "antithesis of general legislation". However, the statutes which create the targeted local option election are general indeed, since they apply to all liquor permit holders. The specific local option election targeted for vote does not occur until after the Department of Liquor Control has held a hearing, after notice to the business, concluded that the business has previously violated the liquor laws, and the relatively difficult process of putting the matter on the ballot all have occurred. In attacking this scheme, amicus is focusing not on the specific election, but the validity of the statute itself.

Alternatively, amicus argues that even if the Ohio statutory scheme is legislative, not adjudicative, the voters no more than the legislature itself can violate the constitution. Petitioner need not quarrel with that proposition to provide a response. Amicus would have the Court believe that the

voters can pick out anyone they don't like and oust them from their license. The statute does not work that way. First, there has to be a violation found. Second, 35% of the voters must endorse putting the measure on the ballot. Third, 50% of the voters must decide to vote in favor of the option. The process itself protects against arbitrariness.

Amicus claims that the petitioner has avoided this Courts' opinion in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), by melding procedure into substance. Amicus simply doesn't accept the right of the legislature to reserve a referendum as part of the rights provided. Petitioner does not assert, as amicus may imply, that this power is unlimited, but, only that the analysis is a challenge to the legislation itself, and not the adjudicative standard of *Loudermill* utilized by the Court below.

Stripped to its essence, the decision of the Court below is nothing more than a challenge to the wisdom of the Ohio legislative formula. If states are not to be straightjacketed into one "acceptable" form of referendum, the Ohio formula should be upheld. The 21st Amendment should command more deference to the Ohio formula than evidenced by the Court below. That is the whole point of the petition and why the Court should grant the writ.

Respectfully submitted,

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